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LIST OF AUTHORITIES.

In The

Supreme Court of the United States.

October Term, 1919.

No. 350.

CHARLES GLEN COLLINS,

Appellant,

versus

FRANK M. MILLER, U. S. Marshal for the Eastern District of Louisiana.

Supplemental Brief on Behalf of the Appellant

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States District Court for the Eastern District of Louisiana filed on the 21st day of February, 1919, upon the petition of the appellant for a writ of habeas corpus. (Record, p. 1.)

The appellant, Lieutenant-Colonel Charles G. Collins, was held in the custody of Frank H. Miller, United States Marshal for the Eastern District of Louisiana, at the City of New Orleans, in the State of Louisiana, under an order of the Honorable Rufus E. Foster, United States District Court

for the Eastern District of Louisiana, awaiting the action of the Honorable Secretary of State of the United States of America, as to whether the accused should be surrendered for extradition to Bombay, India, to answer three separate charges of cheating under Section 420 of the Penal Code of India preferred against him by certain merchants doing business in India.

The first of these complaints is based upon an information which is set forth on page 16 of the Record and charges the appellant with the offense of cheating in connection with the purchase on February 7, 1919, of a pearl necklace, of the value of about 75,000 rupees, from the firm of Pohoomull Brothers, doing business at Appollo Bunde, Bombay, India.

The second complaint is based upon an information which is set forth on page 39 of the Record and charges the appellant with the offense of cheating in connection with the purchase on February 19th, 1917, of certain jewels valued at 67,500 rupees from the firm of Ganeshi Lall & Sons doing business at Agra, Simla and Calcutta, India.

The third complaint is based upon a deposition which is set forth on pages 78 to 80 of the Record, and charges the appellant with the offense of cheating in connection with the purchase of a pearl button on February 26, 1917, of the value of 1700 pounds sterling from Mahomed Alli Zaimal Ali Raza of Sitaram Gully, India.

The judgment appealed from will be found on page 105 of the Record and is as follows:

JUDGMENT.

(Filed February 21st, 1919.)

In the United States District Court for the Eastern District of Louisiana.

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In the Matter of the Application of Charles Glen Collins for Writs of Habeas Corpus and Certiorari.

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As to the commitment of relator to await the action of the President of the United States on the application for the extradition of relator to answer the charge of obtaining property by false pretenses from Mahomed Alli Zaimel Ali Raza, relator's application for habeas corpus is denied.

As to the commitment based on the charge of obtaining property by false pretenses from Pohoomull Brothers and on the charge of obtaining property by false pretenses from Ganeshi Lall & Sons, the writs of habeas corpus are granted, but relator is remanded to the House of Detention to await further proceedings in said last two named affidavits.

And it is further ordered that, as to the said two affidavits last mentioned this cause be and is hereby remanded to the Honorable Rufus E. Foster, Judge, to the end that relator be given the opportunity of introducing such evidence as he might offer at a preliminary examination under the law of Louisiana.

Given this 21st day of February, 1919.

(Signed) W. I. Grubb.
U. S. District Judge.

These complaints will be considered in the order in which they were filed.

Charge of Pohoomul Brothers.

On the 22nd day of September, 1917, a certain Udharam Patarbagh (or Partabrai) filed in the Esplanade Police Court of Bombay an affidavit or information, charging Lieutenant Colonel Charles G. Collins with having committed "the offence of *cheating* under Section 420 of the Indian Penal Code" and prayed that he might be charged and dealt with according to law (Record, p. 16). The matter was adjourned from time to time by the magistrate in order that the complainant might produce witnesses to enable the magistrate to act under the Fugitive Offenders Act, until the 11th day of October, 1917, on which last mentioned day the depositions of the said Udharam Partabrai, and of Lokumul Sahijram and J. D. Sherston Baker were received. Copies of said depositions are identified as depositions of witnesses Nos. I, II and III, respectively (Record, pp. 19 to 24). On the same day a warrant for the arrest of the accused was issued by the Chief Presidency Magistrate of Bombay to a certain Arthur Fuller of the Bombay Police Force, commanding him to arrest the accused "charged with the offence of *cheating* at Bombay under Section 420, Indian Penal Code, in respect of a pearl necklace" and to produce him at the Chief Presidency Magistrate's Court at Bombay. By virtue of this warrant the accused was arrested during the month of November, 1917, at New Orleans, La., where he was temporarily located engaged in looking after certain oil property interests which will be hereinafter more particularly referred to. His arrest was accomplished upon the request of the British Consul and the accused was held without bail for the arrival of the documents from India, but was after the lapse of about forty days, released upon bail (upon the ground that further confinement would prove detrimental to his health) to await the pleasure of the British authorities as to the fixing of the date of the hearing upon their application for his extradition.

Attached to the above mentioned information, depositions of witnesses Nos. I, II and III and warrant, is a copy of an application of the said Patarbagh (or Partabrai) bearing date the 19th day of October, 1917, praying leave to record further evidence and that a fresh warrant may be issued so as to comply with the provisions of the Extradition Treaty between Great Britain and the United States of America (Record, p. 24). The additional "*evidence*" thus introduced consists of a deposition of A. Fuller taken on the 19th day of October, 1917, *or eight days after* the date of the only warrant that was ever issued upon the complaint of Pohoomul Brothers or their manager; Exhibits A, B, C, D, E, F, G and H were filed on the same day. (Record, pp. 26 to 31.)

The information (there is no indictment) (Record, p. 16) alleges that the complainant is the Bombay manager of Pohoomul Brothers, a firm of jewelers, silk merchants and curio dealers; that on or about December 20th, 1916, the accused in company with Mrs. Olsen and Mrs. Elsie Muntz, to the latter of whom he was engaged to be married, visited Pohoomul Brothers' shop and made some small purchases; that on December 23rd, 1916, the accused purchased of them a silk rug for Rs 650 and paid for it by a cheque on Thomas Cook and Son of Bombay, which cheque was paid upon presentation; that a few days later the accused and Mrs. Muntz called and asked to be shown some pearl necklaces; that subsequently the complainant took some necklaces to the bungalow where the ladies were residing and that Mrs. Muntz selected a necklace of the value of Rs 72,250, but it was not then purchased; that on January 30th, 1917, the accused bought a pearl ring for Rs 1,000 for which he paid; that on February 2nd, 1917, the accused purchased the said necklace for Rs 75,000, some of the pearls having been changed since it was first shown; that he promised to pay for the same; that he gave the complainant a draft for £5,000 on E. Curtice & Company of London in payment; that complainant's firm was not then

satisfied with the draft and did not accept it or give delivery of the necklace; that on February 3rd, 1917, the accused in company with a member of the complainant's firm, had an interview with a Mr. Brent, the manager of the International Bank, and that Mr. Brent suggested that the accused should wire E. Curtice & Company to pay £5,000 to the International Bank's London office; that *"subsequently,"* the date not being stated, accused *informed* the complainant's firm that he had cabled E. Curtice & Company "and that the amount of the draft *would be duly paid* to the International Bank by E. Curtice & Co." That on February 7th, 1917, Mrs. Muntz called at the complainant's shop and that the necklace was delivered to her; that on February 10th, 1917, the complainant asked the accused whether he would pay complainant Rs 15,000 on account of the said draft and that accused then gave complainant's firm a cheque for Rs 15,000 on Thos. Cook & Son, which cheque was duly honored; that on February 22nd, 1917, complainant's firm received a letter from the International Bank stating that their London office had advised that they had received no money from E. Curtice & Co.; that on February 23rd, 1917, the accused was interviewed and stated that he had instructed his London agents to sell some shares, but they had advised against it so he had suggested a loan instead; that so February 25th, 1917, the accused stated that it would take a month to sell his shares and he proposed to give them a draft for the unpaid balance of £4,000 on the firm of William Collins Sons & Co., of which, it is alleged, he stated he was a partner and that his brother, who was another partner, would not refuse a draft from him; that *on this representation* complainant's firm *returned to the accused the draft on E. Curtice & Co.* and accepted a draft drawn by the accused on Wm. Collins Sons & Co., and that complainant's firm *agreed with the accused that they would not present the draft until the 15th of April*, 1917; that on February 27th, 1917, the accused with

Mrs. Olsen and Mrs. Muntz left India for Colombo and thence traveled eastward to America; that the draft on Wm. Collins & Co. has not been paid.

The information concludes with the statement that the accused has committed the *offence of cheating* under Section 420 of the Indian Penal Code.

There is no allegation of a *false pretense prior* to the delivery of the necklace to the petitioner on February 7th, 1917. The representations made by the petitioner on February 23rd and 25th, 1917, even if untrue, could not have influenced the delivery of the necklace on February 7th, 1917. The only charge made is that the petitioner deceived the complainant, and dishonestly induced the complainant to deliver the necklace "upon a promise to pay for the same, which promise the accused had no intention of performing" (Record, p. 18). This might, perhaps, constitute the offense of "cheating" under the Indian Penal Code, but, as will be more fully shown later, does not constitute obtaining property by false pretenses under the Treaty with Great Britain of December 13th, 1900, 32 U. S. Stat. at Large, p. 1864.

In Partabrai's deposition (Deposition of Witness No. I, Record, p. 19) he says, referring to the conversation with accused about the draft on E. Curtice & Co.: "*Accused assured us that * * * the amount will be paid by E. Curtice & Co. to the Manager of the International Bank, London.*" He also states that on February 10th, 1917, *or three days after* the necklace was delivered to Mrs. Muntz, the accused paid him by check on Thos. Cook & Sons, which check was paid, Rs 15,000, or about $5,000, on account, *and sixteen days after that* gave him a draft for £4,000 on Wm. Collins Sons & Co. upon the express condition, however, that this draft should not be presented for payment until April 15th, 1917. The balance of this witness' deposition consists of hear-say statements made to him by his solicitors and by other persons who are not named, but who are described by him as

"reliable sources" of information. He shows that he knows nothing as to the truth or falsehood of the allegations found in this portion of his deposition, but says he has no reason to disbelieve them and that he accuses Col. Collins of having *"cheated"* his firm.

This affidavit also completely fails to make any charge of false pretenses made by the petitioner *prior* to February 7th, 1917, which induced him to deliver the goods. Affiant's statement is:

> "Accused assured us that he had sent a telegram as arranged and that the amount *will be paid* by E. Curtice & Co., to the Manager International Bank, London. *Trusting to these assurances*, we gave the accused the necklace" (Record, p. 20). * * * I say the accused has cheated us. If he had not given the *assurance* I have spoken of we would not have given the necklace to him." (Record, p. 21.)

There is no evidence in the Record that tends even to prove that the petitioner did not send the telegram as stated, and his promise that the draft would be paid, as will be more fully shown later, even if not intended to be fulfilled, would not constitute the transaction the obtaining of property by false pretenses.

The next witness was Mr. Lokumul Sahijram, one of the partners of Pohoomul Brothers (Deposition of Witness No. II, Record, p. 22). This witness makes a very significant admission. He testifies that on the day after the date of the purchase of the necklace the accused told a man by the name of Tejumull in witness' presence to carry a cablegram for him to the cable office; that witness read the cablegram; that it was addressed to St. Louis, saying "Cable 2500 dollars more available if needed"; that this cablegram was sent and that it impressed Pohoomul Brothers with the fact that accused was a rich man *"and that they could safely trust him."*

The alleged false representations referred to by this witness as to the accused being a member of the firm of Wm. Collins Sons & Co., and owning oil fields in Mexico are shown to have been made, if at all, after the delivery of the necklace. The affidavit at most only states that the petitioner "assured us" the draft would be paid, and they "believed" him (Record, p. 23).

One of the errors of law committed by the Judge, who acting as a commissioner, has held Col. Collins for the action of the Honorable, the Secretary of State, in this matter (to be more fully referred to hereinafter) is that although Mr. William H. Smith, a resident of the City of St. Louis, Mo., was present in Court at New Orleans, La., at the time of the hearing; although the Judge had adjourned the hearing for several days in order to enable Mr. Smith to reach New Orleans, nevertheless he would not permit either Mr. Smith, Col. Collins or Mrs. Muntz, now Mrs. Collins, who was also present in Court, to testify concerning this cablegram, or in fact, as to any other matter or thing in connection with the case after Col. Collins had admitted that he was the person named in the documents from India and that he was in India during the winter of 1916-1917. Mr. Smith was ready to testify that he had received the cablegram; that the amount named in it was $25,000, not $2,500, and that the sum of $25,000 was actually remitted to him, or rather to his brother for him, at St. Louis at that time by Col. Collins from Bombay and was used to purchase certain oil properties near Houston, Texas, for Col. Collins and Mrs. Olsen, which properties Mr. Smith had been employed by Col. Collins to purchase, and that other large sums were paid to him by Col. Collins in connection with the same transaction, at or about the same time. Col. Collins and Mrs. Muntz offered to give similar testimony, as well as other testimony which would have conclusively shown the transaction with Pohoomull Brothers to have been nothing more than a commercial one where the vendor extends credit to the vendee for a portion of the purchase price, all of which was excluded.

Returning to the deposition of witness No. II, it is sufficient to point out that it is nowhere in it, or in any of the documents, asserted that the cablegram that made the jewelers believe they could safely extend credit to the accused was not everything it purported to be and the same can also be said concerning the other alleged false tokens, unless we are to accept the unsworn and hearsay statements of complainant's solicitors, bankers and detectives as establishing, in a Court of Law in a matter involving the liberty of the accused, facts which by the law of the State of Louisiana can only be established by the sworn statement of witnesses who have personal knowledge of the matters about which they testify.

This witness also testified, as did his manager (Partabrai), that with reference to the draft on E. Curtice & Co. the accused said *"that* £5,000 *will be paid"* (Record, p. 23), not that he had authority to draw, or that he then had funds in the hands of E. Curtice & Co. sufficient to cover the draft. As to the other draft which took the place of the first one that was never used or presented, this witness also agrees with his manager in testifying that what Col. Collins said was that the firm of Wm. Collins Sons & Co. *"will not refuse it,"* not that he had the funds there to meet it at that time or authority to draw. In fact the statements in both depositions to the effect that the jewelers agreed not to present this draft until April 15th, 1917, negatives any inference that there could have been any representation to the effect that the draft was then good or that there was money then there to pay it.

The next witness was Mr. J. D. Shertson Baker, solicitor for Pohoomull Brothers (Deposition of Witness No. III, Record, p. 24). He merely stated that he had caused inquiry to be made about the accused and that he is of opinion that a *prima facie* case of *cheating* under Section 420 of the Indian Penal Code has been made out by the depositions. This witness was allowed to file as Exhibit F with his deposition a letter dated August 14th, 1917, signed by solicitors residing in London in which they make certain quoted ex-

tracts from a letter which they say they have received from solicitors at Glasgow, whose names are not even given. These Glasgow solicitors do not pretend to have any personal knowledge as to the truth or falsity of the gossip which they relate, and yet this letter to complainant's Bombay solicitors from their correspondents at London quoting extracts from an alleged letter from unnamed persons, said to be solicitors at Glasgow, in which they state what certain other unnamed persons have told them about Col. Collins is treated as if it were evidence and is even dignified by being bound in with and attached to the three depositions hereinbefore mentioned, all of which are certified by the Consul-General of the United States at Calcutta. From the remarks made by the Judge acting as commissioner, who has held Col. Collins for the action of the Secretary of State, it appears that he must necessarily have given this thrice distilled extract of hearsay the weight of actual evidence. This phase of the case will be touched upon in another portion of this brief.

The only other deposition in support of this charge is one of A. Fuller, inspector, taken on October 19th, 1917 (Record, p. 26), or *eight days after the issue of the warrant*. Even if it could be considered, it will be seen at a glance that it has no probative value and the same is true of the letter of another official referred to in it and filed as Exhibit H.

Charge of Ganeshi Lall & Company.

On the 1st day of December, 1917, a certain Birjmohan Lall (or Lalla) filed in the Court of the Chief Presidency Magistrate at Bombay, a declaration or information (there was no indictment), charging Lieutenant Colonel Charles G. Collins with the offense of *cheating* under Section 420 of the Indian Penal Code and prayed that he might be judged and dealt with according to law (Record, p. 39). On the same day a warrant for the arrest of the accused was issued by the Chief Presidency Magistrate of Bombay to the aforesaid

Arthur Fuller, of the Bombay police force, commanding him to arrest the accused and produce him at the Chief Presidency Magistrate's Court at Bombay. The documents in support of this charge (Record, pp. 41 and 42) were offered in evidence before Judge Foster acting as a commissioner, at New Orleans, Louisiana, on the 30th day of October, 1918, at the time when the documents supporting the charge made by Pohoomull Brothers were also offered.

Both sets of documents were objected to by counsel appearing on behalf of Col. Collins and were received over his objection.

Attached to the information in the matter of Ganeshi Lall & Company are the depositions of Birjmohanlal Lalla (or Birjmohan Lall), Dattatraya Ramschandra and Arthur Fuller.

The information (there is no indictment) (Record, pp. 42 to 44) alleges that the complainants carry on the business of jewelers and curio dealers at Agra, Simla and Calcutta; that the accused was at the time of the filing of the information under arrest in the United States on an extradition warrant issued by the Chief Presidency Magistrate of Bombay on the complaint of cheating filed by Udharan Patarbagh of Pohoomul Brothers; that about the middle of February, 1917, the accused with Mrs. Olga Olsen and Mrs. Elsie Muntz were staying with Her Highness, the Maharani Kapurthala and the accused purchased from your complainants' firm certain jewelry of the value of Rs 67,500; that the purchase was completed on the 19th of February, 1917, when the accused gave the complainants his cheque for £500 on Thomas Cook & Son of Bombay, and his promissory note, payable sixty days after date for £2,000 and that he also promised to give the complainants through the complainants' agents, Thomas Cook & Son of Bombay, a draft on E. Curtice & Company of London for £2,000 payable sixty days after date; that the equivalent in pounds sterling of the purchase price of the

jewels was £4,500; that the accused represented that he was a partner in the firm of Wm. Collins Sons & Company of Glasgow, and a colonel in the Howe Battalion of the Royal Naval Division, then on leave of absence; that he assured complainants that a cheque for £500, his sixty-day promissory note for £2,000 and the sixty day draft for £2,000 would all be duly paid; that the said check for £500 was duly honored; that the accused delivered to Thomas Cook & Son as complainants' agents, the aforesaid sixty day draft for £2,000; that the accused left India on or about the 27th day of February, 1917; that neither the said promissory note nor the said draft has been paid.

While this complainant asserts that the accused made certain representations, he does not of his own knowledge declare them to be false, nor does he claim that these representations induced him to part with the jewels. On the contrary he declares:

> "He (accused) *assured* your complainant that the said cheque for £500; the said promissory note for £2,000, and the said draft for £2,000, would be duly paid." (Record, pp. 39-40, sec. 6.)
>
> "Your complainant's firm believed the *assurance* of the accused, *and were induced thereby* to deliver to him the above mentioned jewels." (Record, p. 40, sec. 7.)

And he further declares:

> "Your complainant submits that the accused deceived your complainant and thereby dishonestly induced your complainant's firm to deliver the said jewels to him *upon a promise to pay* for the same *which promise* the accused had no intention of performing." (Record, p. 40, sec. 15.)

And he concludes the complaint:

> "Your complainant *therefore* submits that the accused *has committed the offense of cheating.*" (Record, p. 40.)

The further statement by Brijmohan Lall, at the top of page 41 of the Record, that:

> "Accused told us that he had money at Messrs. Clarges and Company," is not shown to be false, and even if it were, it is unimportant on this issue, as the affiant states: "*He (accused) had all the goods at this time,*" so that the alleged statements had not induced them to part with the goods.

The remaining portion of the information consists of statements alleged to have been made to the complainants by their solicitors, bankers and detectives. These matters are not alleged as facts or even upon information and belief, nor is the document which is characterized as the information of Birjmohan Lall sworn to.

In Birjmohanlal Lalla's (Birjmohan Lall's) statement (Record, p. 42) he says that he first met the accused in Agra in January, 1917; that with him was Sir Edwin John of Agra and Commander Holmes, also Mrs. Trapman, Mrs. Olsen and Mrs. Muntz; that subsequently complainant called on the accused at Bombay and showed him jewelry, but no agreement was reached as to price; that on February 15th complainant wrote the accused a letter which is filed as Exhibit No. 2 (Record, p. 45) and which is a request that the accused shall examine the wares which the complainant was offering to sell him and a request that complainant be afforded an opportunity to show the accused an extremely fine ruby of uncommon size; that an appointment was arranged and that complainant and his father went to the Cecil Hotel at Delhi with a box of jewels and showed them to the accused, Mrs. Olson and Mrs. Muntz; that some of the jewelry was selected and the price agreed on was £2,500; that accused gave his check on Thomas Cook & Sons of Bombay for Rs 7,500, leaving a balance of £2,000 to be paid by promissory note in the afternoon because they had no "hundi" papers then; that

accused stated that he was a partner of Collins Sons & Company and promised to wire to his bank from Bombay *"to pay the drafts on the due date"*; that in the afternoon complainant and his father went to accused's room with the stamped "hundi" papers and accused wrote his promissory note for £2,000 payable sixty days after date and made the same payable at E. Curtice & Co., 8 Clarges Street, London; that after this transaction had been finished accused again looked at jewels which complainants offered and decided to buy one large emerald for £2,000; that he did not pay at the time because they had no "hundi" paper; that accused said he would give a draft to complainant's agents, Thomas Cook & Sons in Bombay; that before leaving Delhi on the morning of February 20th, 1917, accused gave complainants a letter which is filed as Exhibit No. 7 (Record, p. 47), in which he states that he has received the large emerald that he bought of complainants for £2,000 and that he will give a sixty day draft on his agents in London through Thomas Cook & Son in Bombay on Thursday, February 22nd, 1917; that accused subsequently complied with this promise by giving Thomas Cook & Sons the said draft; that the original of said draft is in London and that neither the draft nor the promissory note has been paid.

Attached to this deposition are certain exhibits which were duly objected to at the hearing at New Orleans, but received over the accused's objection. One of these exhibits (No. 13—Record, p. 49), is a copy of an unsworn letter purporting to have been written by one Henry Morser of London on September 28th, 1917, to Genashi Lall of Agra. Mr. Morser does not pretend to have personal knowledge of the matters set forth in his letter. On the contrary, his letter clearly shows that he knows nothing whatever concerning them. Even an unsworn report of a detective, a certain William B. Kemp, employed by Mr. Morser and bearing date September 13, 1917, was received in evidence at the hearing at New Orleans over Col. Collins' objection. This report, as might

be expected, is a mass of misinformation, all of which in addition to being hearsay of the most palpable character, is also immaterial and irrelevant.

Nowhere in this affidavit of Brijmohanlal (Record, pp. 42 and 43) does he state that the accused made false representations that induced him to part with the jewels. He says:

> "If I had known that accused was an undischarged bankrupt, and that Curtice and Company are boarding-house keepers, I would not have given accused the jewelry. I would not have accepted the draft in Bombay." (Record, p. 43.)

In Dattatraya Ramschandra's deposition (Record, p. 43) the statement is made that he is a clerk in Thomas Cook & Sons, and that the sixty-day draft referred to in the foregoing deposition had not been paid.

The only other deposition upon this complaint is that of Arthur Fuller, who merely gives a description of Colonel Collins (Record, p. 44).

Here again, as in the case of Pohoomul Brothers, if the irrelevant, immaterial and hearsay statements contained in communications from solicitors and detectives who do not pretend to have any knowledge concerning the subject-matter of their reports, are disregarded, as they certainly should be, and even if the unsworn declaration of the only witness who claims any knowledge of the facts is accepted as a true statement of the transaction, then the irresistible conclusion must be that the transaction with Ganeshi Lall & Co. was nothing more than a commercial one, where the vendor extends credit to the vendee for a portion of the purchase price; in fact, it is inconceivable that, even if the unsworn, hearsay and immaterial statements of solicitors and detectives are accepted as legally established evidence, and given the full weight that it is possible to claim for them, these transactions can be distorted into anything resembling either the statutory crime of "*cheating*" under the Indian Penal Code, or any crime known to the laws of the State of Louisiana.

Charge of Mahomed Alli Zaimal Ali Raza.

On the first day of December, 1917, a certain Mahomed Alli Zaimal Ali Raza filed in the Court of the Chief Presidency Magistrate of Bombay his deposition (in this case there was neither an information nor an indictment) (Record, p. 79), in which he charged Col. Collins with having committed the offense of "*cheating*" under Section 420 of the Indian Penal Code, and to support said charge, stated that a certain Mr. Dady gave him certain information in January, 1917, in consequence of which he called on Col. Collins and offered to sell him some pearls; that he thinks "*there was some conversation about giving credit at the first interview*"; that after that he called again on Col. Collins, and that Mr. Dady acted as interpreter because Raza does not speak English; that he, Raza, "*understood that Col. Collins was a big man and very wealthy and a partner of Collins & Son*"; that Col. Collins gave witness a diary saying it was the diary of "*their office*"; that he said he had shares worth thousands of pounds; that Col. Collins took Mr. Dady aside and spoke about payment; that witness thought Mr. Dady "*was a big man also*"; that witness agreed to give the pearls on credit; that Col. Collins liked one of the pearls and said he would come back and purchase it after he had visited his Rajah friends; that on February 26th, 1917, witness went to see Col. Collins again and sold him the pearl for £1,700; that Col. Collins asked witness "*to give that for credit*"; that Col. Collins gave witness a draft for the pearl; that witness "*promised not to present it for seventy days until the 5th of May*"; that the draft was drawn on C. Curtice & Co., of London; that witness believed accused's representations that he was a partner in Wm. Collins & Son; and that the check has not been paid.

The most that can be said for this deposition is that the affiant believed the statement that Mr. Dady made to him, not under oath, as to what the accused had said to Mr. Dady.

As bearing on the question of false pretenses on the part of the accused, this statement is absolutely only hearsay.

Nor does the complainant charge that these alleged misrepresentations induced him to part with the pearl stud. His statement is:

> "If I had known accused was an undischarged bankrupt I would not have accepted the cheque."
>
> "If I had known C. Curtice and Company was a boarding-house and not a Bank I would not have accepted the cheque." (Record, p. 80.)

On the same day a deposition of Kaihkurkroo Dady was filed (Record, p. 80), in which he stated that he learned that Col. Collins wanted to buy some pearls, and got a letter of introduction to him and called to see him about Feb. 1st, 1917; that witness knew a party who had a very large stock of pearls and the next day he took this party to see Col. Collins, who introduced them to Mrs. Olsen, and that Mrs. Olsen selected a string of pearls out of a large mass shown to her; that Mrs. Olsen wanted the pearls made up into a necklace; that accused broached the subject of credit, and that witness said he would ask the complainant and let him know; that the subject of credit was mentioned to the complainant in the motor on the way back; that complainant asked the witness to make inquiries and let him know whether he was a desirable person to whom to give credit; *that witness consulted a Mr. Furdiuji and got certain information;* that Col. Collins liked a button pearl shown to him by complainant and subsequently bought it for £1,700; that Col. Collins gave witness two diaries, "*one for complainant* and one to myself"; that accused wrote in the diaries; that he said William Collins & Son was his firm; that he had a considerable number of shares, and that he was on six months' leave; that accused gave a demand draft asking complainant to present it two months later.

Here the witness clearly shows that in giving information to the complainant he was not acting alone on the representa-

tions of the accused, but that, at the request of the complainant, he made an entirely independent investigation of his own, and obtained information from Mr. Fuldiuji. This completely negatives the vague suggestion that credit was given on statements made by the accused. Neither this witness nor, as shown above, the complainant, asserts that the goods were parted with because of false pretenses on the part of the accused.

In this case there was also filed the same day a deposition of Birjmohanlal Lalla (or Birjmohan Lall) (Record, p. 81), one of the other complainants, in which he stated that he had correspondence with friends in London regarding accused and had inquiries made, and he filed as exhibits copies of the same letters from Harry Morser and the detective, William B. Kemp, that are also filed as exhibits in support of the charge made by the said Birjmohanlal Lalla (or Lall) and to which unsworn, hearsay and irrelevant communications reference has already been made.

In this case the acts which the committing magistrate, Judge Foster, has held to be *prima facie* established are that:

> "the defendant purchased the pearl stud, or was instrumental in its purchase, for £1700, and that he gave in payment of it, a check or draft on a firm in London with which he had no funds deposited, and against whom he was not specially authorized to draw the check." (Record, p. 98.)

And he ruled:

> "This makes out a *prima facie* case of obtaining goods by false pretenses, whether he subsequently intended to pay for the goods in some other way or not, and the matter is one that should come before the Indian Courts for trial on the merits. Therefore, I will hold him for requisition from the Secretary of State." (Record, p. 98.)

It will be noted that this action is not based on a ruling that there was a *prima facie* case established of false pre-

tenses on the part of Colonel Collins in respect to his wealth, army standing, membership in the firm of Collins & Company, etc., which induced the complainant to part with the pearl stud. All of that is eliminated by the specific statement by the Court that he based his action upon the giving of a draft without special authority against a party with whom the drawer had no funds *at the time*, although the complainant admits he had promised not to present this draft for 70 days (Record, p. 80).

This, we most earnestly insist, does not constitute the offense of "obtaining of money, valuable securities or other property by false pretenses," under the Treaty with Great Britain, 32 U. S. Stat. at Large, p. 1864, upon which alone the accused could be extradited.

Treaty References.

Extradition treaties between the United States and Great Britain are the following:

Treaty of August 9, 1842, Article X; 8 U. S. Statutes at Large, p. 576;

Treaty of July 12, 1889, as amended and proclaimed March 25, 1890; 26 U. S. Statutes at Large, p. 1508;

Treaty of December 13, 1900; 32 U. S. Statutes at Large, p. 1864.

ARGUMENT.

No Extraditable Offense Charged.

Colonel Collins stands charged with having committed the offense of cheating as that offense is defined and prescribed by Section 420 of the Indian Penal Code. This section of the Indian Penal Law is as follows:

"Section 420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

1 Stokes Anglo-Indian Codes, p. 254.

This offense or crime is nowhere mentioned in either of the three treaties between this Nation and Great Britain.

The nearest approach to it appears in the Treaty of December 13th, 1900, but there is a very material difference between the crime therein named and that, with the commission of which the accused stands charged.

The Treaty of December 13th, 1900, includes among extraditable crimes that of:

"11. Obtaining of money, valuable securities or other property by false pretenses."

32 U. S. Stat. at Large, p. 1864.

The difference between this crime and that of cheating under Section 420 of the Indian Penal Code is that proof of false representations of a state of things *past or present* is essential to a conviction under one, while all that is required under the other is proof of a promise of *future performance* which the promisor *did not intend* to perform.

An illustration of the American doctrine of false pretense is afforded by the case of State of Louisiana vs. Clement Colly, 39 La. An. 841, where it was held that in a prosecution for obtaining money or property by false pretenses, the indictment must contain averments that the accused made false representations of a state of things past or present, and that the indictment will not be good if the alleged false representations refer to the future only.

And again, in the same opinion the Supreme Court of Louisiana said:

> "A promise is not a pretense within the meaning of the Louisiana Statute, even when the party making the same *does not intend to keep it.*"

The Louisiana doctrine is not peculiar in this respect nor is it limited, in its application, to that State.

It is the same doctrine that is now and has always been applied throughout the Nation.

> Wharton, Am. Crim. Law, secs. 2085, 2087, 2096, 2112;
>
> 2 Bishop on Crim. Law, secs. 397, 400, 401.

Under the Indian Penal Code, however, it has been held:

> "A. intentionally deceives Z. into a belief that A. means to repay any money that Z. may lend to him, and thereby dishonestly induces Z. to lend him money, A. not intending to repay it. A. *cheats.*"
>
> 1 Stokes Anglo-Indian Codes, p. 252 (illustration f).

And again:

> "A. intentionally deceives Z. into a belief that A. means to deliver to Z. a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z. to advance money upon the faith of such delivery. A. *cheats;* but if A., at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."
>
> 1 Stokes Anglo-Indian Codes, p. 252 (illustration g).

Also that:

> "A. receives from B. a Government promissory note, promising to return certain jewels pledged to him, but not intending to do so, and subsequently claims to re-

tain the note for another debt alleged to be due to him by B. A. *cheats.*"

3 N. W. P. 17;
1 Stokes Anglo-Indian Codes, p. 253.

Hence false statement as to a *future fact,* or even a present intention not to do that which one says he will do, may constitute a deception within the meaning of the Indian Offense of Cheating, and consequently one punishable by as much as seven years at hard labor and a fine. This led an Indian Court to observe that:

"The obvious inconveniences resulting from such a doctrine can only be avoided by cleaving to the rule that mere breach of contract is not even *prima facie* evidence of an original fraudulent intention."

Mayne Commentaries on the Indian Penal Code, 350; 9 Bom. H. C. 448;
See foot note—Stokes Anglo-Indian Codes, p. 252.

The gist of the Indian offense of cheating is, as has been seen, a dishonest intention not to perform a promise of future performance, which promise has been relied upon by the promisee, whereas the gist of the American crime of obtaining property by false representations, is a false statement concerning a past or existing fact.

The elements that constitute the offense of cheating in India do not constitute any crime at all in America. It is not every dishonest act that can be said to be a criminal act. The extradition treaties have to do with certain crimes of the more reprehensible or dangerous character, and in the case of our treaty with Great Britain these crimes are limited to thirteen in number. It has never before been suggested that a man who does not pay his debt when it is due and whose offense is of a no more reprehensible or dangerous character than this, must be surrendered to the justice of an Alien Nation to stand trial at a place where unsworn and hearsay letters of attorneys and detectives in the employ of

the creditors seem to be given the weight of legal evidence, and where the law punishes with fearful and shocking severity a mere failure to perform a promise of future payment.

Article X of our Treaty with Great Britain of August 9th, 1842, which is still in force, provides that no person shall be surrendered by either Nation except upon such evidence of criminality:

> "as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

See—

Pettit vs. Walshe, 194 U. S. 205.

The Treaty provisions, as well as the law of the place where the accused was arrested were both ignored by the Judge, who, acting as commissioner, has held Col. Collins for the action of the State Department.

The following extracts from the record of the hearing at New Orleans will be sufficient to establish this proposition:

> "(The Court): Do you think that any testimony in defense is relevant, or anything of that sort?
>
> (Mr. Spearing): Why certainly, if I can prove he didn't make any false pretenses.
>
> (The Court): It doesn't make the slightest difference if he did or did not. It is a question for the Court in India.
>
> (Mr. Spearing): I submit, if I prove as a matter of fact, there was no false pretense—
>
> (The Court): I have nothing to do with that whatever. The question of identity and sufficiency of these depositions is the only thing before me. * * * The only question here is the question as to the identity of the accused and the question whether or not he was in India at the time this alleged offense is supposed to have been committed. There are two things the defendant can show: either he is not the man wanted, or that he was not there at the time the offense is supposed to have been committed. Now he was there at the time and he admits he is the man.

(Mr. Spearing): There is no doubt about that.
(The Court): I will exclude everything else." (Record, pp. 60 and 61.)

The learned counsel for the respondent in Section 5 of his return to the writs herein, found on page 9 of the Record, attempts to distort this reply of Mr. Spearing, "There is no doubt about that," into an admission that Judge Foster had correctly stated the law. It is perfectly obvious from the whole Record that Mr. Spearing's remark applied only to the statement by Judge Foster, "Now, he was there at the time and he admits he is the man."

Again, after the letter of Little & Co., solicitors for Pohoomull Brothers, addressed to Mrs. Muntz, then engaged to marry Col. Collins, and now his wife, in which they take the position that their clients had delivered the pearl necklace to her upon her assumption of the debt for the unpaid balance of the purchase price and looked to her for payment thereof, had been offered in evidence together with an agreement signed by Pohoomull Brothers in which they undertook not to present Col. Collins' draft for about ninety days, the Judge remarked:

"(The Court): I exclude that. Those are all along the line of showing it is a commercial transaction.
(Mr. Spearing): Yes, purely and only a commercial transaction.
(The Court): It was a commercial transaction?
(Mr. Spearing): Certainly it was.
(The Court): I will make the same ruling. I will exclude it all.
(Mr. Spearing): I also offer in evidence numerous and various letters and certificates, showing the military standing and title of the accused, before and after he was in India, but all before the charges were brought.
(The Court): I think they are no more relevant than the others. I will exclude those." (Record, pp. 65 and 66.)

And again, after the hearsay character of the statements in the "Morser" and "Kemp" letters from London had been pointed out:

> "(The Court): The certificate says it would be admissible.
>
> (Mr. Spearing): But it would not be admissible here.
>
> (The Court): All of this evidence was admitted before the Magistrate.
>
> (Mr. Spearing): The Magistrate, yes, and the United States Consul has said that it is admissible there, but your Honor knows it would not be admissible here; your Honor would not admit that testimony here if the accused was charged with an offense here and it was attempted in this country to offer in evidence on any trial, civil or criminal, a letter from an attorney—
>
> (The Court): Yes, but they may have different rules of practice if they want to." (Record, p. 68.)

And again:

> "(Mr. Spearing): * * * Take that report of the private detective in London, hearsay of the worst kind. It may be that that is admissible in India. Your Honor knows, and I know, that it is not admissible here, though under your Honor's ruling, if the certificate is attached, it is admissible in this case.
>
> (The Court): I say, it is a settled rule of this Court that, in extradition proceedings, no matters of defense are admissible; there are only two questions that can be inquired into, the question of identity and the question of whether the accused was present in the demanding state at the time the crime was supposed to have been committed." (Record, p. 69.)

That the Judge at New Orleans erroneously believed that the law of this land affords no protection to a man whose extradition is demanded, provided only the documents are in formal shape and the man is honest enough to admit his identity and that he was at the place where the crime is alleged to have been committed, and also that it matters not whether the alleged acts constitute a crime by the law of the

place where he is found and taken into custody, is shown by this quotation from the Record of the hearing:

> "(The Court, Interrupting): Carries with it the suggestion that he is authorized to draw; whether it is a time draft or a sight draft, it doesn't make the slightest difference. If this case was tried before a jury, and there was no evidence that he told this man from whom he bought the jewelry that this draft would be paid, and the draft came back with the notation 'not authorized to draw,' *and nothing else but that,* the jury would be warranted in finding him guilty." (Record, p. 73. See also "Offer" and Ruling, Record, p. 98.)

This was gross error and it explains, we respectfully submit, why Col. Collins is now in jail for having committed no greater offense than failure to pay a debt contracted in perfect good faith; a debt that he could and would have paid when due if he had not lost all the money that he invested in the oil property hereinbefore mentioned, an investment that the jewelers knew of, because he told them of it as the cause of his inability to pay cash in full and of his having to ask for credit for a portion of the purhase price.

It was gross error for the Judge to hold and rule that the return unpaid of a time draft with the words written on the back thereof by some bank clerk or runner "not authorized to draw," is equivalent in a criminal proceeding of legal evidence of want of authority to draw.

It was gross error for him to hold and rule that when there is no evidence of a false representation of a past or present fact, that the mere non-payment of a time draft *given after* the delivery of the goods would warrant a jury in this country in finding the drawer of the draft guilty of obtaining property by false pretense. The correct view, we submit, is that a time draft is nothing more than a promise that when it matures it will be paid, just as a term note is a promise to pay its amount at maturity.

To this view, however, the Judge expressed dissent and evidently based his conclusion upon this, his fundamental error, be it said with due respect, namely, that a time draft is a promise that it "will be paid *by the person on whom it is drawn.*" No authorities need be cited upon the proposition that a time draft is nothing more than an order to pay. If accepted by the drawee he becomes the primary debtor, and the drawer remains bound as his surety. If not accepted, the drawer remains primarily bound and if, as in these cases, the vendors of the jewels agreed to defer presentation of the drafts, as they all did, until the expiration of sixty days, seventy days and ninety days, respectively, then the drafts constituted nothing more than evidences of the drawer's promises to pay at the maturity of the drafts in case the drawees failed to do so. The drafts were in no way different, so far as constituting evidence of a false representation is concerned, than sixty, seventy and ninety days' notes would have been, and it is clear that a man cannot properly be surrendered for extradition to India because he fails to pay his promissory note.

Col. Collins is charged with an unextraditable offense. This point was made, but was overruled. The protection of the law of Louisiana was then invoked on his behalf, upon the ground, as has been herein shown, that the Treaty affords him such protection. This point was also denied him, the Judge holding: (*a*) That "they may have different rules of practice if they want to" in India (Record, p. 68); and (*b*) the crime of obtaining goods by false representations is committed by a man who makes no representation at all, but who merely gives his time draft for a portion of the purchase price; provided that draft is returned with the words "not authorized" written upon it. And this in the face of the law of Louisiana as laid down in State vs. Colly, *supra,* not to mention the universal doctrine in this Country to the effect that a false representation must relate to a past or present fact and cannot relate to a future event.

VARIANCE BETWEEN THE INFORMATIONS FILED BEFORE THE POLICE COURT OF BOMBAY AND THE CERTIFICATES OF THE SECRETARY TO THE GOVERNMENT OF INDIA AND THE CONSUL-GENERAL OF THE UNITED STATES OF AMERICA AT CALCUTTA.

In the Pohoolmull Brothers case and the Ganeshi Lall case the *Informations* filed state that the accused is charged with *Cheating* under *Section* 420 of the *Indian Penal Code.* This fact appears in the Informations and is also certified by the Chief Presidency Magistrate. In the Alli Raza case, while there is no formal *Information,* there is a certificate of the Chief Presidency Magistrate stating that the accused is charged with *Cheating* under the same section of the Indian Penal Code. The Information in the Pohoomull Brothers case is dated September 9th, 1917; that in the Ganeshi Lall case is without date, but is attached to a certificate dated December 1st, 1917. The three certificates of the Chief Presidency Magistrate stating the charges to be as above set forth are dated, respectively, October 19th, 1917 (Record, pp. 15 and 16), December 1st, 1917, and December 1st, 1917 (Record, pp. 38 and 39).

In the Pohoomull Brothers case the warrant was issued on October 11th, 1917, or eight days prior to the filing with the magistrate of the deposition of A. Fuller and the exhibits relied on, being Exhibits A, B, C, D, E, F, G and H. (Record, pp. 27 to 31.)

We respectfully submit that these exhibits cannot be properly treated as evidence of criminality justifying the surrender of the accused. They are not part of the evidence upon which the warrant was issued for the simple reason that they were not before the magistrate until eight days after it was issued. They should therefore be disregarded, but it is certain, judging from the remarks of the committing Judge which are in the Record, that they played an important part in influencing his action in holding Col. Collins.

In the other two cases the warrants were issued on December 1st, 1917.

No further steps in India were taken until April 2nd, 1918, when A. H. Grant, Secretary to the Government of India, in the Foreign and Political Department, made his certificate in each case to the effect that the local police magistrate had authority to issue the warrants. (Record, pp. 14 and 15.)

On April 8th, 1918, the Consul-General of the United States added his certificate to each set of documents. It will be noted that in these certificates of the Secretary and the Consul-General the charge against the accused is stated to be that of "obtaining valuable property by false pretences." (Record, p. 14.)

This irregularity and variance with respect to a most material matter, we respectfully submit, is fatal to the attempt to extradite the accused and should result in his discharge. The officials so certifying were located, as their certificates show, at Calcutte, while the police Court is at Bombay, and these officials could know nothing of the charges except as disclosed to them by the Informations themselves and the certificates of the magistrate before whom they were filed, nor do either of them state that they have any other knowledge of the matter than as so disclosed. In fact it is not within the province or authority of either of them to do more than to formally authenticate the documents submitted to them. They can neither add anything to nor take anything from those documents. If a man stands charged with larceny neither the Secretary nor the Consul-General, or both acting in concert, can by anything they may choose to write into their certificates of authentication, change the offense charged to murder. Whatever they say the offense charged is, it remains what it was before they added their certificates, and that it was and is *Cheating* in each of these cases cannot be denied.

A possible explanation can be suggested although it does not help the case for the prosecution, or cure the fatal error which appears on the face of the documents submitted by the demanding Nation.

It is this: When the Pohoomull Brothers' charge of cheating was made in Sept., 1917, Lieutenant-Colonel Collins was performing his duties as instructor at the Valcartier instruction camp in the Province of Quebec. Later, when the camp was closed for the winter, he came to the United States for the purpose of trying to recover something out of the wreck of his oil properties in Texas, a financial disaster which is the sole cause of the delay in the payment of his indebtedness to these Indian merchants, and one which was caused by the sale, without his knowledge, of the properties he had paid $25,000 for a twelve months' option to purchase. The deposition of A. Fuller, above mentioned, states that he, Fuller, had learned after the proceedings had been commenced on the Pohoomull charge, of Col. Collins' removal from Quebec to the United States, and from Exhibit H (Record, p. 31) in the Pohoomull case it appears that the advice of a Mr. A. F. Kindersley, Under Secretary to Government, was sought and that the advice was that as Col. Collins was then in the United States, it would be necessary for Pohoomull Brothers to apply to the Magistrate "for a warrant of arrest against Collins, stating the offense *in terms of the treaty between the United States and Great Britain.*" Mr. Kindersley's letter is dated October 17th, 1917, and is addressed to the Commissioner of Police of Bombay. This was six days after the issuance of the warrant in the Pohoomull case, and although it was prior to the charges made and the warrants issued in the other cases, those charges and warrants are also upon the charge of cheating, probably because the evidence shows that credit was extended by the merchants and that the only offense was the failure to perform a promise of future payment.

If an unextraditable offense can be changed to one that is extraditable by the simple expedient of *"stating the offence in terms of the treaty,"* of what use, may we ask, is it to impose treaty limitations upon the right of Great Britain to demand the surrender of persons who are found in this country? Even criminals may find a safe asylum here unless their crimes are within the terms of an extradition treaty. Col. Collins is not a criminal. It is true that he is an unfortunate man, who has trusted too confidently the alluring inducements of an oil land promoter and who thereby has been unable until this time to pay the balances due merchants who willingly extended credit to him, and who are now using, or at least are attempting to use the police department of Bombay and the State Department of the United States as collection agencies.

Exclusion of Practically All Evidences Offered on Behalf of Accused.

The record shows that Colonel Collins was examined at the New Orleans hearing on his own behalf, and that after he had testified that he was in India at the time these various transactions are alleged to have taken place, in company with his fiancee, Mrs. Muntz, and her friend Mrs. Olsen; that he subsequently married Mrs. Muntz; that Mrs. Olsen died on the Thursday preceding the day of the hearing, the Judge stopped the examination and inquired as to its purpose (Record, p. 60). The record contains the proffer made (Record, pp. 61 to 65) and the argument made by Mr. Spearing in support of his contention that it was the duty of the Judge to hear testimony in explanation of the matters and things referred to in the *ex parte* depositions taken at Bombay (which argument we adopt and refer to with much confidence (Record, pp. 66 to 75), and it also shows the conclusion of the Judge, which was, that he would exclude everything else that the accused might testify on his own behalf, or that other wit-

nesses might testify on his behalf, *except the admission that he was there at the time, and that he is the man described in the documents from India.*

At the first hearing the charges brought by Pohoomull Bros. and Ganeshi Lall & Company were before the Judge, and upon the second hearing the charges brought by Alli Raza were considered. It is true that upon the second hearing Colonel Collins was allowed to commence his testimony with reference only to a statement in Alli Raza's deposition, to the effect that "there was some conversation about giving credit at the first interview," but the Judge's final conclusion and ruling upon the hearing on the Alli Raza charge was the same as on the other charges, *i. e.*, that all testimony must be excluded except with relation to the identity of the accused and his presence in India at the time of the alleged transactions.

This is fully shown on page 98 of the Record, to which we ask particular attention.

We respectfully submit that this was gross and most injurious error.

In the matter of *In re* Ferez, 7th Blatchford, 34, and same case Fed. Cases, 4645, it was held in an extradition case that the accused has a right to be examined as a witness in his own behalf, if he is a competent witness, by the laws of the State in which he is found; and *In re* Kelly, 25 Fed. Rep. 268, it was held that he also has the right to examine witnesses in his own behalf.

The Kelly case arose under the Treaty of 1842 between this Country and Great Britain. Judge Nelson in that case cited Judge Blatchford's decision in *In re* Ferez, *supra,* with approval, and discharged the accused upon a writ of *habeas corpus,* saying that it was a fatal error for the accused to have been denied his right to call a witness on his own behalf.

This same point is considered in *In re* Charleston, 34 Fed. Rep. 531, which is another case arising under our Treaty

with Great Britain, and it was there held that the accused has the right to examine witnesses on his own behalf before the committing magistrate, and that the competency of evidence is to be determined by the law of the State in which the hearing is had, which is merely another way of stating that which the treaty itself so clearly provides, *i. e.*, that no person shall be surrendered by either of the two Nations concerned except upon evidence of criminality,

> "as, according to the laws of the place where the fugitive, or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

Section 1010 *of the Revised Statutes of the State of Louisiana* of 1870, which section is still in force in that State, provides that if the offense is not punishable by death it will be the duty of the judge or committing magistrate

> "to examine on oath, such witnesses as may appear against him (the accused) and reduce their depositions to writing. *It shall also be his duty to receive the voluntary declaration of the person accused,* and the answers which, without promise or threat, he shall make to the questions which the examining judge or magistrate shall put to him, and cause them to be reduced to writing and signed by the prisoner in his presence and that of two witnesses, or if he can not sign, to mention that circumstances and to certify the declaration with his signature and that of two witnesses, which declaration thus certified and signed shall be evidence before the grand and petit jury."

The learned counsel for the respondent falls into another error in paragraph 5 of the return to the writs herein. (Record, p. 9.)

He attempts to draw a distinction between an offer to testify, and an offer to make a voluntary statement. This error no doubt arose out of his interpretation of the words from Section 1010 of the Revised Statutes of Louisiana of 1870,

printed in italics above. He apparently overlooked the provisions of Act 45 of the General Assembly of Louisiana of 1886, which reads as follows:

> "When any person charged with having committed any offense against the laws of this State, is brought before any justice of the peace or other committing magistrate in any parish of this State, or before any of the recorders of the City of New Orleans, it shall be the duty of said justice of the peace, committing magistrates and recorders of the City of New Orleans, to take in writing, the depositions and evidence of all material witnesses on behalf of the State, *and when so requested by the accused, the evidence of the material witnesses for the defense,* and also, in the discretion of said justice of the peace or recorder, to take their recognizance or bond in such sum as may be reasonable, conditioned for their appearance before the Court having jurisdiction of the offense, there to give evidence in the case and not to depart without leave of the Court; which depositions and recognizances or bonds shall be forthwith returned to the clerk's office of the Court having jurisdiction of the case."

This law is referred to in State *ex rel* District Attorney vs. Recorder, 45 La. An. 309, in which the Court gives the history of the legislation in Louisiana on the subject, and on page 313 recognizes that this Act makes it the duty of the Committing Magistrate to receive and have reduced to writing the testimony of witnesses for the defense, and goes on to say:

> "This act applies in all cases (when any person charged with 'having committed *any* offense') before committing magistrates, and is not irreconcilable with the duties devolving upon recorders in bailable cases. It is not limited to capital cases, but applies generally in all cases before 'committing courts.'"

This case in substance holds that under the laws of Louisiana, an accused, no matter what the offense charged, is en-

titled, on the preliminary examination, to introduce evidence in his behalf—not only his own testimony, but the testimony of other witnesses—and such documents as may be material, so the Committing Magistrate may determine whether or not such a *prima facie* case has been made out on the preliminary hearing as will justify the committing of the accused for trial.

In State vs. Steuart, 34 La. An. 1037, it was held that the accused is entitled upon preliminary examination before the Judge or committing magistrate, to have other witnesses than himself examined in his own behalf.

In Tinsley vs. Treat, 205 U. S. 20, it was held that the regular practice which exists in some States, under which one indicted of crime is not entitled to a preliminary examination prior to the trial on the merits, has no application to proceedings under United States Revised Statutes, sec. 1014, for the arrest and removal to another Federal district for trial of a prisoner there charged with offense against the United States, and, in an opinion by Chief Justice Fuller, it is shown that the refusal to admit the evidence of the accused, to the effect that he could not have committed the crime of which he stood charged because he was not at the place where the alleged crime was committed at the time of its alleged commission, amounted to such fatal error as to justify the discharge of the accused upon a writ of *habeas corpus*.

In Charlton vs. Kelly, 229 U. S. 447, which was a case arising under our treaty with the Kingdom of Italy, it was said:

> "There is not and can not well be any uniform rule determining how far an examining magistrate should hear a witness produced by the accused person. The proceeding is not a trial. The issue is confined to the single question as to whether the evidence for the State makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by *local statutes*."

In that case the committing magistrate refused to hear evidence of insanity and his action in so doing was sustained by the Supreme Court, but the opinion states that by the law of New Jersey an accused has no right to have evidence exonerating him go before a grand jury and in that State, unless the prosecution consents, such witnesses may be excluded.

We have already seen that the law of Louisiana is the opposite, in that respect, to the law of New Jersey.

See also—

In re Martin, 5 Blatchford, 303.

If the authorities we have cited upon this point do not of themselves conclusively establish the error of the committing judge in excluding all evidence of witnesses who were present in Court and who had come great distances to testify in explanation of the alleged transactions, and in excluding all evidence of Colonel Collins except his admissions of identity and presence at the place and time of the alleged transactions, the statute that we now refer to would certainly seem to dispose of the matter in favor of our contention.

Section 5270 of the Revised Statutes of the United States provides that whenever there is a treaty or convention for extradition between the Government of the United States and any foreign Government, the Judge or Commissioner, having jurisdiction in the place where the accused is found, shall issue his warrant for the apprehension of the person charged that he may be brought before such Judge or Commissioner

> *"to the end that the evidence of criminality may be heard and considered."*

If there had never been judicial interpretation of the words we have quoted from the statute, showing that "evidence of criminality" means evidence both for the prosecution and for the accused; if the treaty between Great Britain and our Country had omitted the provision, heretofore referred to,

which makes the "laws of the place where the fugitive shall be found" the sole test of procedure and criminality, the Act of Congress of August 3, 1882, Chap. 378, Sec. 3, 22 Stat. 215, would resolve this question in favor of our contention, for in that statute it is provided that:

> "On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged, setting forth that there are witnesses whose evidence is material to his defense, that he can not safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means and is actually not able to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed and in such cases the cost incurred by the process and the fees of witnesses shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed on behalf of the United States."

If, as the committing Judge must have supposed, Colonel Collins had neither the right to testify on his own behalf, or to have witnesses examined on his behalf, then there has stood upon the statute books of the United States during thirty-six years, a perfectly useless and misleading statute, for it is impossible to conceive that Congress intended that an indigent accused was to have the right to testify and examine witnesses on his own behalf in extradition proceedings, unless that same privilege is to be extended to all persons alike.

As was pointed out by this Court in the case of Grin vs. Shine, 187 U. S. 181 (47 L. Ed. 130), it is not intended that extradition treaties should be made the pretext for collecting private debts or of wreaking individual malice. For this reason defects in extradition proceedings which are merely technical are entitled to receive full and deliberate consideration. In this case not only technical but fundamental rights of the petitioner have been disregarded.

CONCLUSION.

Lieutenant-Colonel Charles Glen Collins should be discharged from custody, upon the following grounds:

1. That the transactions proved by the depositions are not criminal in their nature, even according to the Indian law.

2. That even if said transactions are criminal according to the Indian law, they constitute the offense of cheating under Section 420 of the Penal Code of India, and that said offense is not an extraditable one under either of the three extradition treaties in force between this Country and Great Britain.

3. That there is a material difference between the offense of cheating under Section 420 of the Penal Code of India and the extraditable offense of obtaining property by false pretenses, in that the gist of the Indian offense of cheating is the failure to perform a promise of future payment, where the intent not to perform is proved to have existed at the time of the making of the promise, while the gist of the extraditable offense of obtaining property by false pretenses is a false representation concerning a past or present fact.

4. That under the statutes of the United States and the extradition treaties with Great Britain, the law of the place where the person charged is found, determines the character and the competency of evidence of alleged criminality necessary to justify such person's apprehension and commitment for trial, to the same extent as if the crime or offense had been committed at the place where such person is found, and that the transactions proved by the depositions constitute no offense or crime under the laws of Louisiana.

5. That there is a fatal variance in each of the three sets of documents in that the charges in each case are that the offense of cheating has been committed, while the certificates of the Secretary for the Indian Government and of the Consul-General of the United States recite the charges to have been of an entirely different nature and character.

6. That the committing Judge erred in excluding the evidence offered by and on behalf of the accused.

Each one of these grounds is alone sufficient to justify the discharge of the accused. The Department of State of the United States is not a Collection Agency for either foreign or domestic merchants, nor should it be possible for it to be so used.

Respectfully submitted,

J. ZACH. SPEARING,
J. KEMP BARTLETT,
Attorneys for Appellant.

Supreme Court of the United States,

OCTOBER TERM 1918.

No. [redacted]350

CHARLES GLEN COLLINS, APPELLANT,

vs.

FRANK M. MILLER, U. S.
MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA.

No. [redacted]351

TOM. F. CARLISLE, BRITISH CONSUL GENERAL,
Appellant,

vs.

CHARLES GLEN COLLINS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR APPELLEE IN No. 977 AND FOR APPELLANT IN No. 978.

ROBERT H. MARR,
CHARLES FOX,
Of Counsel for Appellee in No. 977 and for Appellant in No. 978.

WM. BRIGGS, PRINTER, 9-15 MURRAY ST., N. Y.

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Supreme Court of the United States.

October Term 1918.

No. 977.

CHARLES GLEN COLLINS, APPELLANT,

vs.

FRANK M. MILLER, U. S.
Marshal for the Eastern District of Louisiana.

No. 978.

TOM. F. CARLISLE, BRITISH CONSUL GENERAL, APPELLANT,

vs.

CHARLES GLEN COLLINS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

STATEMENT.

The appellant in No. 977 was committed for extradition, upon three separate charges of obtaining property by false pretences in India.

The proceedings were held before and heard by Hon. Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana, at New Orleans. He deemed the evidence sufficient to sustain the charges and committed the accused to

abide the order of the President of the United States in the premises (pp. 100-101) and certified the proceedings to the Secretary of State (p. 104).

The complainants in India were respectively Pohoomull Brothers, Ganeshi Lall & Sons and Mohamed Alli Zaimel Ali Raza.

The extradition treaty with Great Britain of 1900-1901 (32 Stat. 1864) provides for extradition for the crime of "obtaining money, valuable securities or other property by false pretences".

The appeal in No. 977 is from the judgment (p. 105) of the District Court for the Eastern District of Louisiana, denying the application of the appellant for a writ of habeas corpus to review his commitment on the charge in the Mohamed Alli Zaimel Ali Raza case.

The appeal in No. 978 is from the same judgment of the same District Court, granting a writs of habeas corpus to Collins on his commitment on the charges in the Pohoomull Brothers and Ganeshi Lall & Sons cases, but remanding him to the House of Detention in New Orleans and sending the proceedings back to Judge Foster to the end that the accused be given the opportunity of introducing such evidence as he might offer at a preliminary examination under the law of Louisiana, the accused not having been given the opportunity in the first instance to testify in his own behalf (p. 61). The error assigned in No. 978, is the granting the writs of *habeas corpus* and remanding the proceedings to Judge Foster that the accused be given an opportunity to introduce such evidence as he might offer at a preliminary examination under the laws of Louisiana (p. 116).

Pohoomull Case.

The accused was charged (pp. 11-13) with obtaining a pearl necklace on February 7th, 1917 in Bombay, India, from Pohoomull Brothers by false pretences, by representing that he was a wealthy man; that he then and there had a right to draw a draft offered in payment for the necklace for £5000 on Messrs. E. Curtice & Co., 8 Clarges Street, London, but the fact was that the accused was not a wealthy man but on the contrary, a bankrupt, and had no right to draw a draft for £5000 or any amount on E. Curtice & Co.

The information and depositions in support of this charge show that Collins (pp. 16-19) had made some purchases from Pohoomull Brothers for which he had paid cash and later purchased this pearl necklace for 75000 rupees and gave a draft (p. 28) for £5000 on E. Curtice & Co. (p. 20) 8 Clarges Street, London in payment.

The complainants were not satisfied with this draft and did not deliver the necklace, (p. 20) until after an interview was held with the complainants' representatives', accused, and the Manager of the International Bank at Bombay. The latter suggested to the accused to wire to E. Curtice & Co. to pay £5000 to the International Bank's office in London (p. 20). Subsequently the accused informed complainants that he had cabled to E. Curtice & Co. and that the amount of the draft would be paid to the International Bank in London on receipt of the cable.

On February 7th, 1918, the necklace was delivered on behalf of the accused (p. 22), the accused assuring the complainants that he had sent the telegram as arranged;

that the amount would be paid by E. Curtice & Co. to the International Bank at London and trusting to these assurances, the necklace was delivered. (pp. 21-23)

On February 10th, 1917 (p. 20) the complainants, having some drafts to meet, obtained 15000 rupees from the accused on account of the Curtice draft, the proceeds therefrom not having been received; the 15000 rupees to be returned to the accused when the proceeds of the Curtice & Co. draft had been received in Bombay.

On February 22nd, 1917, (pp. 20-28) the complainants were advised by letter from the International Bank that their London office had received no moneys from E. Curtice & Co. The next day the accused was interviewed and stated he had instructed his London agents to sell some shares but they advised him against doing so and had suggested a loan instead.

On February 25th, 1917 another interview was had with the accused when he stated it would take a month to sell the shares and proposed to give them a draft for £4000 on the firm of William Collins Sons & Co. of which he stated he was a partner and the firm would not refuse a draft on them. Upon this representation the draft upon E. Curtice & Co. was returned to the accused and the draft on William Collins Sons & Co. was taken by the complainants who agreed not to present it until April 15th, 1917 (pp. 17-21-23).

On February 27th, 1917, the accused left India (pp. 18-21).

On April, 21st, 1917 the complainants were advised (pp. 19-21-25-29) that payment of the draft on William Collins Sons & Co. had been refused with the message "no authority to draw", and that the draft had been presented twice but had not been paid. It also appears

that the accused was not a member of the firm of William Collins Sons & Co. (p. 30 and pp. 5 and 6, addition to record.)

GANESHI LALL & SONS.

The accused was charged (pp. 34-35) with obtaining on February 19th, 1917, from Ganeshi Lall & Sons by false pretences, one emerald and diamond necklace, five emeralds, one star ruby and three sapphires of the value of £4500 by falsely representing that he was a wealthy man, a partner in the firm of William Collins Sons & Co. of Glasgow and London; that he was a Colonel in the Howe Batallion of the Royal Naval Division; that he was then on six months leave; and he then and there had a right to draw a draft for £2000 on Messrs. E. Curtice & Co., 8 Clarges Street, London; that the said E. Curtice & Co. were bankers and that he, as a man of wealth, was amply entitled to an additional credit of £2000; whereas in truth and in fact he was not then and there a wealthy man but on the contrary, a bankrupt; that he was not and never had been a member of the firm of William Collins Sons & Co.; that he was not a Colonel in the Howe Batallion of the Royal Naval Division and was not then and there on six months' leave; that he had no right to draw a draft for £2000 or any other amount on E. Curtice & Co.; that E. Curtice & Co. were not bankers and that he was not entitled to additional credit of £2000 or to any credit whatsoever.

The information and depositions in support of this charge (pp. 39-53) show that this firm first came into contact with the accused in January 1917 by his making small purchases (p. 42) and at that time the accused gave to a member of the firm, his card (p. 48) which reads:

"Lieut. Col. C. G. Collins, 51 South Street, W., Park Lane, Howe Batallion, Royal Naval Division."

On February 19th, 1917, the accused at Delhi purchased the jewelry involved in this charge (p. 46) and gave a check on account thereof for £500, but before credit was given to him, the accused told the complainants that he had some interest in the Canadian Railway and was a partner of William Collins Sons & Co. and had some shares in London too (p. 42). After the payment of the £500, there remained a balance of £4000, for which he gave a promissory note payable on E. Curtice & Co., 8 Clarges Street, London, for £2000 (p. 37), and a draft on this same firm for £2000 (p. 48), and the accused told complainants that he would wire to his bankers from Bombay to pay the drafts on the due day. The difference in dates between the note and the draft is accounted for (p. 43) that at the time he purchased the large emerald, the last item in the account (p. 46), not having stamped paper there, the accused said he would give to the complainants' agents, Messrs, Thomas Cook & Sons at Bombay (p. 43), a draft for £2000, which he did (p. 48); that the complainants testify that if it had been known the accused was an undischarged bankrupt and E. Curtice & Co., boarding house keepers, they would not have given the accused the jewelry and would not have accepted the draft in Bombay; that they knew William Collins Sons & Co. to be a good firm and believed the accused when he assured them he was a partner therein and believed all his representations. (p. 43). Neither the draft or the note given by the accused were paid. The letter and report in evidence (pp. 50-52) show that Colins was adjudicated a bankrupt in England on the 19th of August, 1904, with heavy liabilities and a second petition of

bankruptcy was filed aainst him in 1906, but he did not surrender to his examination; that he was not in any way connected with the firm of William Collins Sons & Co. that E. Curtice & Co. were not bankers and that E. Curtice & Co. was not aware any bill had been drawn upon them.

Mohamed Alli Zaimel Ali Raza Case.

The accused was charged with obtaining in Bombay on February 26, 1917, from Mohamed Alli Zaimel Ali Raza by false pretences (p. 76), one pearl button of the price and value of £1700 by representing that he was a wealthy man; that he was a partner in the firm of William Collins Sons & Co. of Glasgow and London; that he was a colonel in the Howe Battalion of the Royal Naval Division and was then on six months leave; that he then and there had a right to draw a draft for £1700 on Messrs. E. Curtice & Co. and that the said draft would be paid and that the said E. Curtice & Co., 8 Clarges Street, London, were bankers: whereas in truth and fact the accused was not then and there a wealthy man, but on the contrary, a bankrupt; that he was not and never had been a partner in the firm of William Collins Sons & Co.; that he was not a colonel in the Howe Battalion of the Royal Naval Division and that he was not then and there on six months leave; that he had no right to draw a draft for any amount on E. Curtice & Co. and the accused then and there knew said draft would not be paid and the said E. Curtice & Co. were not bankers.

The information and depositions in support of this charge (pp. 79-87) show that Mrs. Olsan purchased some pearls (p. 79) and that the accused chose a pearl button for himself. He gave to this complainant and another

witness (p. 81) each a diary and wrote in the diaries, Lieut. Col. Charles G. Collins, C. M. G., c/o Messrs. Collins, Sons & Co., Ltd., Glasgow, Scotland (p. 83) and stated that William Collins Sons & Co., was his firm; that he held a considerable number of shares; that he was a partner in the firm; that he was on six months leave and would not take an active part in the business (p. 81).

In this case the accused was examined as a witness in his own behalf (pp. 89-92) and attempts to make it appear that the purchase of this pearl button was part of the transaction in which the necklace was purchased for Mrs. Olsan; it appears in his testimony, according to his own story, that she paid for the necklace that she purchased with a check on her father's firm of bankers and that he paid for the pearl button with a £1,700 draft on E. Curtice & Co. In his testimony he does not claim that E. Curtice & Co. were bankers or that there was any such firm or that such a firm had ever been his agents and admits that Mr. E. Curtice had not been in the banking business; and states that Curtice was the owner of a number of boarding-houses and hotels and that he was a business man to that degree and had been associated with him many times in the past in business deals (p. 92). He admits he drew drafts on E. Curtice & Co. without authorization and without notification and without funds there to meet them (pp. 92-97) but claims they always paid his drafts in the past. He acknowledged that a petition for involuntary bankruptcy was filed against him in the United States in 1902. He also admits that in January, 1916, when he was making these representations and giving out his diaries and cards, that he was not a Lieut.

Col. in the Royal Naval Division; that his connection with the Admiralty had to come to an end (p. 94). The representation made by him that he was a Lieut. Col. in the Howe Battalion of the Royal Naval Division on six months leave upon his own testimony was a false representation. In his testimony he does not claim to be a partner in William Collins Sons & Co. but would have it appear that his father had left shares of stock in this corporation in trust for the accused together with his brothers and sisters but when asked what had become of his interest in that concern, would have it appear that banks in Glasgow had loaned large sums against his share.

On behalf of the prosecution in all of these proceedings, (pp. 59-88) there was offered in evidence the depositions duly certified as required by the act of August 3, 1882, of James Paterson and Hugh Allan, both directors in the firm of William Collins Sons & Co., Ltd., showing that the accused had never been a shareholder in the Company; that he never was an employee; that he never had at any time any personal connection with the business; that he had no authority to draw on the Company; that he had no reasons whatever for believing that a draft on the Company would be honored (pp. 5 and 6, addition to record).

There was also offered in support of the charges the depositions taken in London of John Richard Campbell Howie and Edward Curtice, showing the presentation of the drafts on Edward Curtice at 8 Clarges Street, London, and the draft drawn on William Collins Sons & Co.,

and that Edward Curtice of 8 Clarges Street, did not carry on any banking business anywhere; that he was not a member of any firm or company; that he did not know of any firm or Company called E. Curtice & Co. or E. Curtice & Sons but that he recognized the accused by the photograph shown to him and had known him for ten or twelve years; that he had known his father and uncle and he had had business relations with the firm of William Collins Sons & Co., Ltd., of Glasgow; that the accused had no right or authority to draw on him in February, 1917, for £5,000 or any other sum; that Edward Curtice had never been advised that he had done so and if he had written to ask for such authority, he would have had to refuse.

Depositions of these witnesses taken in London and Glasgow were offered in each case and were refused admission (pp. 59-89) upon the ground that they were taken June 22, 1918, and were taken in Glasgow and London after the warrant of arrest had issued.

The accused offered as a witness, William H. Smith, to show that the accused was engaged in oil transactions (pp. 64 and 65) to corroborate the testimony that the accused would have given regarding the oil transactions; this was refused.

POINTS.

I.

THE COMMITTING MAGISTRATE HAD JURISDICTION OF THE SUBJECT MATTER AND OF THE ACCUSED. THE REVIEW IN THIS PROCEEDING IS LIMITED TO THE SIMPLE QUESTION AS TO WHETHER THERE WAS ANY LEGAL EVIDENCE AT ALL UPON WHICH THE MAGISTRATE COULD DECIDE THAT THERE WAS EVIDENCE SUFFICIENT TO JUSTIFY THE COMMITMENT OF THE APPELLANT.

It is settled by the decisions of this court, in proceedings for extradition, that if the committing magistrate had jurisdiction of the subject matter and of the accused and the offense charged is within a treaty of extradition, and the magistrate, had before him competent legal evidence upon which to exercise his judgment as to whether the facts were sufficient to establish the criminality of the accused for the purpose of extradition, such decision cannot be reviewed on *habeas corpus* either originally or by appeal.

Charlton vs. *Kelly*, 229 U. S., 447;
McNamara vs. *Henkel*, 226 U. S., 520;
Grin vs. *Shine*, 187 U. S., 181;
Terlinden vs. *Ames*, 184 U. S., 270-278;
Bryant vs. *United States*, 167 U. S., 104;
Ornelas vs. *Ruiz*, 161 U. S., 502-508.

In *Ornelas* vs. *Ruiz*, *supra*, (p. 512) Chief Justice Fuller delivering the opinion of the court, says:

> "We are of the opinion that it could not be held that there was substantially no evidence calling

for the judgment of the Commissioner as to whether he would or would not certify and commit under the statute and therefore as a matter of law, he had no jurisdiction over the subject matter; this being so, his action was not open to review on habeas corpus."

In *Bryant* vs. *United States, supra,* p. 104, Mr. Justice Brown said:

"The question before the Commissioner in this case was whether in the language of the Treaty of 1842, Article X, 8 stat., 572-576 there was such evidence of criminality according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. In other words, according to our laws, whether there was probable cause to believe him guilty of the crime charged. Rev. Stat., 5270, *Benson* vs. *McMahon,* 127 U. S., 457-462. The question before us is even narrower than that, viz: whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify his commitment for extradition."

In *McNamara* vs. *Henkel, supra.* It was held that the question simply is whether there was any competent evidence before the commissioner entitling him to act under the statute. The weight of the evidence was for his determination.

II.

THERE WAS COMPETENT EVIDENCE BEFORE THE EXTRADITION MAGISTRATE JUSTIFYING THE HOLDING OF THE ACCUSED FOR EXTRADITION. THE CERTIFICATE OF THE CONSUL GENERAL OF THE UNITED STATES AT CALCUTTA, BEING IN THE REQUIRED FORM, THE DEPOSITIONS WERE PROPERLY ADMITTED IN EVIDENCE.

The Consul's certificate states that the annexed papers "are properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the Tribunals of British India as required by the Act of Congress of August 3rd, 1882" (p. 14).

The Act of August 3rd, 1882 (22 Stat. 216), is the law now in force, as to evidence on the hearing in an extradition case. Section 5 of this Act is as follows:

> "Evidence on the hearing. 'In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper

or copies thereof, so offered are authenticated in the manner required by this act.' "

Where documentary evidence has been authenticated as required by the statute, it is admissible, the certificate determines the admissibility thereof leaving to the extradition magistrate merely the question of determining the sufficiency of the evidence therein contained.

Elias vs. *Ramirez*, 215 U. S., 398;
Grin vs. *Shine*, 187 U. S., 192.

The certificate of the principal diplomatic or consular office of the United States if in proper form is absolute proof, whatever may be the tenor of the certificates of the foreign officials to the same documents.

Re Fowler, 18 Blatch., 430; s. c., 4 Fed. Rep., 303;
Re Behrendt, 22 Fed. Rep., 700.

A review of the evidence discloses the fact that accused started out with the settled purpose to swindle Indian jewelers to as large an extent as possible: the son of a rich and prominent family, a man of wide travel and experience in practically every quarter of the world, and used to command, makes his appearance at Bombay in December of 1916 with two ladies of wealth. The party takes up quarters at a first class hotel, and begins to make the acquaintance of people of position. He gets along well in making friends with English people and with the natives, paying visits to various Rajah friends. To obtain the recognition of Europeans of standing, the relations between accused and the two ladies traveling with him must be satisfactorily explained, hence to his

English acquaintances, he introduces one of the ladies as his wife, the other as his sister; but when he wished to cheat Pohoomull Bros. out of 75,000 rupees of pearls, he has his "fiancee" make the selection as "a wedding present." (p. 22).

After a short stay at the hotel, the Collins party takes a bungalow in a quarter of Bombay where the rich reside, (p. 19) frequents the shops of the complaining witnesses and buys rather freely, paying cash or in checks that are cashed. Having thus skilfully built up a fictitious credit, he prepares to make a grand coup.

On February 2, when Mr. Lokumull called at the Collins' bungalow with the pearl necklace, accused gave in payment a 60 day draft for £5,000 drawn on E. Curtice & Co. Mr. Lokomull returned with the draft and the necklace to Pohoomull Bros., not being satisfied with the draft.

At a conference at which were present, accused, the manager of the bank with which Pohoomull Bros. did business and a member of the Pohoomull firm, it was agreed that accused would telegraph his agents to pay the draft on presentation, thus changing it from a time draft to a sight draft. With this understanding, the draft was accepted and on February 7, the necklace was delivered to accused. On February 10, Pohoomull Bros. having drafts to meet requested accused to make some payment in cash, and accused did then give a check on Thomas Cook & Sons for 15,000 rupees. On February 22, the Bank informed Pohoomull Bros. that the Curtice draft had not been paid. On February 23, Mr. Lokumull and Mr. Tejumull "went to the accused at his bungalow

and we told him what our banker had written." Then the accused told us that he had wired his agents E. Curtice & Co. to sell some of his shares and that he had received a reply saying that the shares do not fetch the proper value and so it was advisable to get a loan. Accused also said that he had wired to his agents to give the terms on which he could get a loan but that no reply had been received." (p. 23). He then gave a draft for £4,000 on William Collins & Sons & Co., Ltd. Accused knew that the Curtice draft for £5,000 was not going to be paid on presentation and he knew that knowledge of that fact would come to Pohoomull Brothers before he got out of India, hence the payment of £1,000 on February 10th. With full knowledge thus brought home to him of the dishonor by E. Curtice & Co. of the £5,000 draft, accused did none-the-less on February 22, draw on the same firm for £2,000 in favor of Ganeshi Lall, and on February 23, draw on the same firm for £1,700 in favor of Ali Raza. On February 27, the Collins party sailed for Colombo, accused having with him many thousands of pounds worth of jewels, and leaving behind £9,700 of worthless paper.

That all of his representations as to his military position and his membership in the firm of William Collins Sons & Co., and his financial condition which induced the credit and the delivery of the jewelry were all false and untrue.

III.

THE ACTS OF THE ACCUSED WERE CRIMINAL IN INDIA AND IF THEY HAD BEEN COMMITTED IN LOUISIANA, WOULD HAVE BEEN CRIMINAL THERE.

INDIAN PENAL CODE.

SEC. 420—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted in to a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

SEC. 24—Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing dishonestly.

SEC. 813 of the Revised Statutes of Louisiana reads:

"Whoever, by any false pretense shall obtain, or aid and assist another in obtaining from any person, money, or any property, with intent to defraud him of the same, he shall on conviction, be punished by imprisonment at hard labor or otherwise not exceeding twelve months."

In British India extradition is governed by the Extradition Acts of Great Britain of 1870 (33 and 34 Vict c 60) and of 1873 (36 and 37 Vict c 60).

The Indian Extradition Act of Nov. 4, 1903 Act XV contained in Legislative Acts of 1903 (p. 163) provides

for the administration in British India of the Extradition Acts of 1870 and 1873 and of the Fugitive Offenders Act of 1881 and for the extradition of criminals in cases to which the extradition acts of 1870 and 1873 do not apply and in the schedule attached to the Act of extradition offences on requisitions from Foreign States, "cheating" reference being made to Sec. 420 of the Indian Penal Code, is named.

That the offense of the accused is called "cheating" in India does not make it without the treaty. It is not necessary that the crime should have the same name in both countries.

As was said in *Greene* vs. *U. S.*, 154 Fed. R., 406, while the extradition and the indictment must be for the same criminal acts, it does not follow that the crime must have the same name in both countries. The same crime often has different names in different countries. If the act in question is criminal in both countries and within the terms of the treaty nothing more is required. * * * It is not a question of names.

In *Powell* vs. *U. S.* (C. C. A.), 206 Fed. Rep., 403, it was said that if the complaint intelligibly describes the offense and if the offense so described is punishable by the laws of both countries and if by any name it is included in the extradition treaty that is enough.

In *Wright* vs. *Henkel*, 190 U. S., p. 58, the Court says:

> "The general principle of International Law is that in all cases of extradition *the act done* on account of which extradition is demanded must be considered as a crime by both parties." (Italics ours.)

Where the affidavit charges that accused did receive and retain stolen property, he is not entitled to be discharged on the ground that in the State where found receiving stolen property is a crime, but retaining it is not, the presumption being that the demanding country will not violate its treaties and will not try accused for an offense for which he was not extradited.

Bingham vs. *Bradley*, 241 U. S., 511.

In *Kelly* vs. *Griffin*, 241 U. S., 13, 14, it is said:

> "It is objected that although perjury is mentioned as a ground for extradition in the treaty, the appellant should not be surrendered because the Canadian Criminal Code, Sec. 170, defines perjury as covering false evidence 'whether such evidence is material or not.' As to this it is enough to say that the assertions charged here were material in a high degree and that the treaty is not to be made a dead letter because some possible false statements might fall within the Canadian Law that perhaps would not be perjury by the law of Illinois. 'It is enough if the particular variety was criminal in both jurisdictions.'"

The United States on behalf of the State of Washington asked in England for the extradition of a fugitive upon evidence which made out a case of larceny and embezzlement within the definition of the Washington Statutes.

In England the same evidence showed neither larceny or embezzlement, but it did show the crime of "fraud by a banker" within Sec. 81 of the Larceny Act, which was an extraditable offense under the treaty of 1889 with the United States.

The prisoner sued out a writ of habeas corpus held that he must be remanded for extradition.

Rex vs. *Dix*, 18 Times Law Reports, p. 231 (K. B.).

"In *Re Arton*, No. 2, volume L. Q. B. D., 1886, the prisoner had been committed under the treaty between Great Britain and France for a number of offenses within the treaty and among them one offense described as 'faux en ecritures de commerce' (falsification of accounts), and a contention was made upon the argument of a writ of habeas corpus, that under the law of England the accused was not guilty of forgery; that the falsification was not in the order of committal described as committed by Arton as a director, officer, or member of a public company, or as a clerk, officer, or servant, which would be necessary to constitute falsification a crime according to English law; and that even if the order of committal were amended in this respect he could not properly be committed for falsification on the ground that such falsification was not a forgery under the English law. The court held that if the acts of the accused established a crime under the laws of both countries and within the treaty for extradition, it was not necessary that such crime should be called by the same name or under the same head. It was sufficient if it be a crime under the laws of both countries and within the treaty; and that treaties ought to receive a liberal interpretation, which means no more than they should receive their true construction according to their language, object and intent.

The same construction of the treaty between Great Britain and France, that a crime need not bear the same name to bring it within the treaty, if

> it was criminal by the laws of both countries, was also held in *Re Bellecontre*, 17 Cox, C. C., 253, and *Ex parte Piot*, 15 Cox, C. C., 208."

Cheating is a generic term and applies to any fraudulent device by means of which one is induced to part with the ownership of his property, hence, it necessarily includes the obtaining by false pretenses. It has sometimes been said that the chief distinction between "cheating" and "obtaining by false pretenses" is, that cheating may be false representation as to the future, and that false pretenses may be predicated only on the past or present. But this is inexact: a mere broken promise would not justify an indictment for cheating any more than it would justify an indictment for obtaining by false pretenses.

An essential ingredient of each offense is the existence of the fraudulent intent at the time the goods are obtained and the promise or representation made; if such fraudulent intention does then exist the offense is cheating at Common Law, and obtaining by false pretenses under the law of Louisiana.

In *State* vs. *Will*, 49 La. An., 1337, it was held that "cheating" and "obtaining by false pretenses" are synonymous. The language of the Court is:

> "If a person parts with the ownership and possession of his property as the result of fraud practiced upon him, it is not larceny, but a cheat at common law, or obtaining goods under false pretenses under our statute."

If a man buys goods under the representation that it is his intention to pay for the same, and he then and

there has no such intention, it is cheating at common law and obtaining by false pretenses under the law of Louisiana. But if, at the time of buying the goods, it was his intention to pay for them, his failure to pay is neither cheating nor obtaining by false pretenses.

In *State* vs. *Jordan*, 34 La. An. 1219, the indictment and conviction was sustained. The Court says:

> "The charge against the accused was obtaining goods by false pretenses. Amongst the false pretenses set out in the information is this: that the accused represented 'That he then and there wanted to buy goods on credit of the said firm of Flash, Preston & Co., in fair and unusal honest course of trade, with intent to pay honestly for them, etc.' And this is almost immediately followed by the statement that said Flash, Preston & Co. on the faith of said pretenses did deliver goods."

When Collins gave in payment for the jewelry which he obtained, drafts which he had no authority to draw, he obtained by false pretenses.

In *State* vs. *Seipel*, 104 La., 67, it was held that an indictment for obtaining money under false pretenses which avers that accused did falsely pretend that he had certain moneys deposited to his credit in bank, against which he could draw a check, and upon which he did draw a check on which he obtained money, is sufficient averment.

When Collins falsely represented himself as a wealthy man and entitled to credit, and falsely represented himself as a partner in William Collins Sons & Co., and obtained the jewelry, he obtained by false pretenses.

In *State* vs. *Tessier*, 32 La. An., 1227, where the indictment and conviction were sustained, defendant's false pretenses were that his name was Smith, that he was a photographer and in business at Natchitooches, that he had at his house fifty dollars, out of which, he promised to pay the prosecutor twenty dollars the next morning. In this case the Court also said,

> "It is not necessary that the false pretenses should be the sole inducement by which the property is parted with; if they have controlling influence, it is enough, though other minor considerations operate upon the mind of the party."

The learned and experienced Judge who heard the proceedings was familiar with the laws of Louisiana and held that the evidence made out a clear case *prima facie* of obtaining goods by false pretenses (pp. 72-75).

IV.

PROCEEDINGS FOR EXTRADITION ARE NOT LIMITED OR CONFINED TO THE RULES APPLICABLE TO PRELIMINARY EXAMINATIONS AS TO LOCAL CRIMES IN THE PLACE WHERE THE PERSON SOUGHT FOR ON EXTRADITION, IS FOUND.

The provisions in the treaty that delivery up to justice "shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed" were not intended to cover or have any reference to local rules of prac-

tice, but simply that if the *evidence of criminality*, justified a commitment for trial, in the place where the accused was found commitment should follow.

In *Elias* vs. *Ramierez*, 215 U. S., 398, 409, an extradition proceeding which was commenced in Arizona for the extradition of the accused to Mexico on the charge of forgery: the depositions and papers introduced in support of the charge contained, statements of two persons unsworn to, the depositions had attached the certificates of the U. S. Ambassador in Mexico and the charge d'affairs that they were "properly and legally authenticated so as to entitle them to be received for similar purposes" by the Act of Congress of August 3, 1882, and Mr. Justice McKenna says at p. 409:

> "It is further contended that the statements of Resas and Euriques were unsworn to and because unsworn to were not admissible in evidence; that "under the common law and the law of Arizona the unsworn statement of no witness is competent upon a hearing before a committing magistrate" and would not justify a commitment for trial in Arizona. It is hence contended that it was not sufficient to justify the extradition of the appellee. *In re Egita*, 62 Fed. Rep., 972; *In re McPhun*, 30 Fed. Rep., 57; *Benson* vs. *McMahon*, 127 U. S., 457, are adduced to sustain the contention. The answer to the contention is that the statute providing for extradition makes the depositions receivable in evidence and provides that their sufficiency to establish the crime shall be such as to create a probability of the commission by the accused of the crime charged against him. This is

the principle announced by the cases cited by the appellee."

To same effect *Ex parte La Mantea*, 206 Fed Rep., 330.

In *ex parte Glazer*, 176 Fed. Rep., 702 (C. C. A.) an extradition proceeding, the deposition of an accomplice, uncorroborated, was used in support of the extradition, and it was held that the provisions of the New York Code, that a conviction could not he had upon the uncorroborated evidence of an accomplice had no application.

In *Gluckman* vs. *Henkel*, 221 U. S., 512, the complaint referred to bills of exchange and the depositions showed them to be promissory notes. Mr. Justice Holmes says:

> "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while, of course, a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin* vs. *Shine*, 187 U. S., 181, 184; see *Pierce* vs. *Creecy*, 210 U. S., 387, 405. We are bound by the existence of an extradition treaty to assume that the trial will be fair. The evidence in this case seems to us sufficient to require us to affirm the judgment of the Circuit Court."

V.

THE EXTRADITION JUDGE DID NOT ERR IN REFUSING TO HEAR THE TESTIMONY OF THE ACCUSED WHEN IT CLEARLY AND DISTINCTLY APPEARED THAT THE TESTIMONY COULD NOT ALTER THE CONCLUSION TO BE ARRIVED AT FROM THE DEPOSITIONS IN SUPPORT OF EXTRADITION.

Mere errors in the rejection of evidence are not subject to review on *habeas corpus*.

> *Benson* vs. *McMahon*, 127 U. S., 457, 461;
> *Terlinden* vs. *Ames*, 184 U. S., 270, 278;
> *McNamara* vs. *Henkel*, 226 U. S., 520.

The record (p. 60) shows that the accused was sworn and after testifying that he was the person referred to in the depositions from India and who his companions there had been, and a question had been put by counsel to the accused, as to why the accused had gone to Norway the Court asked what was the purpose of the testimony and a colloquy occurred between counsel for the accused and the Court (pp. 60-61) the Judge indicated that the only matter before him was the question of identity and the sufficiency of the depositions, that a defense was for the Court when the accused is tried in the country that requests his extradition.

Counsel for the accused was permitted to place upon the record his tender of proof (pp. 61-64).

If he had been allowed to testify to all contained in the offer, it would not have established his innocence of the charges in the *Pohoomull* and *Ganeshi Lall* cases: there would have yet remained the competent evidence in

the depositions, showing probable cause and justifying his commitment for trial.

In the *Raza* case the accused (pp. 90-97) testified as fully as he desired and this testimony was heard by the same Judge who heard the other cases and they all appear to have been consolidated (p. 98) before the decision of the *Raza* case (p. 98).

The ruling of the extradition Judge was based upon the decision in the case of *Charlton* vs. *Kelly*, 229 U. S., 456, that matters of defence were for the trial Court and not the committing Magistrate: that a proceeding in extradition is not a trial, and the issue is not the actual guilt, but whether there is a *prima facie* case sufficient to hold the accused for trial. In the cited case insanity was offered as a defense.

It was held that the issue in an extradition proceeding is confined to the single question of whether the facts for the State make a *prima facie* case of guilt sufficient to make it proper to hold the party for trial; and an offer of testimony which is in the nature of a defense can be excluded and it was also held that a writ of *habeas corpus* could not be used as a writ of error and that mere errors in the rejection of evidence are not subject to review by a writ of *habeas corpus*.

The claim was strenuously asserted that under Sec. 3 of the Act of August 3, 1882, witnesses for the accused were required to be heard.

Mr. Justice Lurton, p. 641, says:

> "The phrase in §3 of the Act of August 3, 1882, 'that he' (the accused) 'cannot safely go to trial without them' (witnesses) 'cannot be construed as giving a right to a full trial in violation of treaty

stipulations,' but it must be confined to such a preliminary hearing only as was already allowable under the existing practice; viz., such as is appropriate to a hearing having reference only to a commitment for future trial.

"There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the state makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

"In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error, not reviewable by *habeas corpus*. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government. This distinction was taken by Mr. Justice Washington in the case of *United States* vs. *White*, 2 Washington, C. C., when he said:

"Generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The de-

fendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offense is said to have been committed, to explain what is said by the witnesses for the prosecution, and the cross-examination of the witnesses for the prosecution is certainly improper.

"We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense and the burden of making it out is upon the defendant. *Graves* vs. *State*, 45 N. J. L., 203; *State* vs. *Maioni*, 78 N. J. L., 339, 341; *State* vs. *Peacock*, 50 N. J. L., 34, 36. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded. 1 Chitty Crim. Law, 318; *United States* vs. *White, supra; Respublica* vs. *Shaffer*, 1 Dall., 236, 1 L. ed. 116; *United States* vs. *Palmer*, 2 Cranch, C. C., 11, Fed. Cas. No. 15,989; *United States* vs. *Terry*, 39 Fed., 355, 362."

In *Collins* vs. *Johnson*, 237 U. S., 502, 507, the appellant on his trial offered a defense which the appellant

claimed the trial court arbitrarily denied and refused to consider, and attempted a review of the matter by *habeas corpus* and it was held that the refusal of the proffered defense even were such refusal erroneous, could not at all affect the jurisdiction of the court or amount to more than an error committed in the exercise of jurisdiction and was not reviewable, re-stating the familiar rule that the writ cannot be employed as a substitute for a writ of error.

Re Kelly, 25 Fed. Rep., 368, referred to by counsel for the accused was decided in 1885 since which time the rules in extradition proceedings have been changed or modified and technicalities no longer considered. In that case after the close of the evidence on behalf of the prosecution which had all been taken orally before the Commissioner in Minnesota the defendant called a witness in his behalf and on objection interposed by counsel for the prosecution it was sustained; the District Judge held that the defendant should have been permitted to introduce evidence; that the examination should have been conducted according to the laws of Minnesota where the prisoner was arrested and that under the statutes of Minnesota it enacted "after the testimony to support the prosecution is finished the witnesses for the prisoner, if he has any, shall be sworn and examined."

Accused at the hearing was deprived of no right secured to him under the law of Louisiana regulating preliminary examinations.

The Louisiana Statute (R. S., 1010), regulating preliminary examinations was adopted in 1805 (Chap. VIII, Sec. 1), and has come down to us unchanged at the

present day, except as to what judges or justices may hold these examinations. This statute, so far as pertinent to this controversy reads:

> "When the person so accused shall have been brought before the justice or magistrate * * * it shall be his duty to examine on oath such witnesses as may appear against him, and to reduce their depositions to writing. It shall be his duty to receive the voluntary declaration of the person accused, and the answers which, without promise or threat, he shall make to the questions which the examining judge or magistrate shall put to him, and to cause them to be reduced to writing, and signed by the prisoner in his presence and that of two witnesses, or if he cannot sign, to mention that circumstance, and to certify the declaration with his signature and that of two witnesses, which declaration thus certified and signed, shall be evidence before the grand and petit jury."

In 1805 the Legislature of Louisiana adopted a crimes act, an act "which is the foundation of our penal system" (*State* vs. *Gaster*, 45 La. A. ,640), and the final section 3990 of the present Revised Statutes provides "that all laws or parts of laws contrary to or in conflict with the provisions of this act, and all laws or parts of laws on the same subject-matter, be and the same are hereby repealed, except the thirty-third section of an act entitled: 'An act for the punishment of crimes of the Crimes and Misdemeanors approved May 4, 1805. This 33d section of the Crimes Act of 1805 (now R. S., 976) reads:

> "All crimes, offenses and misdemeanors, hereinbefore named, shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indict-

ment (divested, however, of unnecessary prolixity) the method of trial, the rules of evidence; and all other proceedings whatsoever in the prosecution of crimes, changing what ought to be changed, shall be according to the common law, unless otherwise provided."

In *State* vs. *McCoy*, 8 Rob. (La., 547), it was said:

> "The Legislature, in adopting the common law rules of proceeding, method of trial, etc. adopted the system as it existed in 1805, modified, explained and perfected by statutory enactments, so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions."

And the Court, therefore, held that the venue of indictments for murder was governed by the provisions of 2 and 3 Edw. 6 and 7 and of 2d Geo. 2.

It was held in *State* vs. *McNeil*, 33 An., 1332, that by adopting the common law rules of evidence in criminal proceedings, as that system existed in 1805, we adopted the provisions of 1 and 2, Phil. and Mary C. 13, Sec. 5, governing the admissibility of depositions taken by the coroner at the inquest, and that the amendment of this statute by Acts of Parliament subsequent to 1805 was without effect in Louisiana.

It was said in *State* vs. *Wheat*, 111 La., 871, 872:

> "With us in Louisiana, the rules of evidence in criminal trials as well as forms of indictment, method of trial, etc., must be according to the common law of England as it existed in 1805, unless otherwise provided.
>
> "At that time (1805) the English statute on the subject of depositions in criminal matters, taken

before coroners and magistrates were 1 and 2 Philip and Mary C. 13, sections 4, 5, and 2 and 3, Philip and Mary C. 10. These statutes of Philip and Mary were received as common law in Louisiana.

"The statutes of Philip and Mary were silent as to what should be done with the certified examinations, but it seems the construction of the common law upon them made them competent as evidence at the later trial on proper showing made."

And the rules which had been established by the English courts and were still in operation in 1805, regulating the circumstances under which such depositions could be read upon the trial has been adopted in Louisiana as a part of the common law, *State* vs. *Britton*, 131 La., 875; *State* vs. *Wheat*, 111 La., 871; *State* vs. *Timberlake*, 50 La. An., 308; *State* vs. *Laque*, 41 A., 1070; *State* vs. *Granville*, 34 La. An., 1088; *State* vs. *Harvey*, 28 La., 105.

"The voluntary declarations of the accused made before the committing magistrate on a preliminary examination, and certified to by him in the presence of two witnesses, in conformity with Section 1010 of the Revised Statutes of 1870, cannot be offered in evidence or used on the trial before the jury by the accused. *Declarations so taken are intended only to perpetuate for the use of the State, such confessions as the accused may choose to make.*" (Italics ours).

State vs. *Vandergraff*, 23 La. An., 98.

The *Vandergraff* case was affirmed in the following cases: *State* vs. *Toby*, 31 La., 756; *State* vs. *Dufour*, 31 La., 804; *State* vs. *Smith*, (La., 1919) 81 S., 34. In *State*

vs. *Pierce*, 2 M. (La.), 253, it was held, following the common law, that if the magistrate had taken the confession upon oath it was not admissible upon the trial. The same view is expressed by Chitty, (Vol. I, p. 84).

Defendant greatly relies upon *State* vs. *Stewart*, 34 La. An., 1037. The question really involved was this: Where the testimony for defendant has been taken on preliminary examination, has he the right upon his trial to offer such depositions in evidence under the same conditions as would make depositions taken on behalf of the prosecution admissible? On page 1040 of the opinion, the Court says:

> "We think that the reasons advanced by the Judge, in support of his rule, are unreasonable, and that he erred in excluding the testimony. It is true, as contended by the District Judge, that Section 1010 R. S. directs that in preliminary examinations, the depositions of the State witnesses alone are to be taken down in writing; but it is equally true, that in this State, the forms of indictment, the method of trial, rules of evidence, and all other proceedings in the prosecution of crimes, must be according to the common law of England, as it existed in 1805, unless otherwise provided—33 An., 1332, *State* vs. *McNeil*. Now under the common law, criminal jurisprudence has firmly established the right of the accused to be defended by counsel, and to have his witnesses heard at the preliminary examination of the offense charged against him. And under provisions of the law of England, directing that the testimony of witnesses against the accused at a preliminary examination, be reduced to writing, it has been held that the Justice ought to take, and certify as well the information, proof and evidence, which

tend in favor of the prisoner, as those which are brought forward against him. Chitty's Criminal Law, Vol. 1, pp. 60 and 64."

The statement by the court that defendant's right to have his witnesses examined at preliminary examination was firmly established at common law would seem to be error. The common law granted no such right, Blackstone IV, 296. The rule at common law was that accused had no right to have his witnesses examined at preliminary examination, but it seems that if they were examined, the defense on his trial before a jury had the right to offer the depositions of his witnesses under the same circumstances under which the crown could offer depositions. See Bishop's Criminal Procedure, Vol. I, Sections 1201 and 1198. The sole authority quoted is Chitty (pp. 79, 80, not 60 and 64), and Chitty cites as his authorities 4 Black. Com., 360, and 1 Ann. St., 2, C. 9. An examination of these citations shows that prior to the statute of Ann, those charged with treason or felony were not allowed on *trial before a jury* to have their witnesses sworn, and this defect that statute remedied, but neither Blackstone, nor the Statute of Ann makes any reference whatsoever to preliminary examinations.—Story (3 Com., Sec. 1786) shows that the Statute of Ann had reference to the trial before a jury exclusively.

"In criminal matters that jurisprudence (namely of the English Courts) is, by positive statutory enactment, made our guide. * * * The consequence is that in criminal matters this court must follow the decisions of the English courts as the best expression of the common law, in preference to those of the Supreme Court of the United States. Adopting this as the correct guide,

it becomes our duty to conform our jurisprudence thereto." *State* vs. *Scott*, 49 A., 268. Thereupon the court proceeded to overrule *State* vs. *De Rance*, 34 A., 186. The case of *State* vs. *Lyons*, 113 La., 993, is to the same effect as the *Scott* case.

> "The common law authorities upon all question of procedure in criminal prosecutions are our only guides in such matters."
>
> *State* vs. *De Pass*, 31 A., 489.

Following the behest of the Supreme Court of Louisiana, frequently repeated, let us now see what the common law on the subject of preliminary examination is.

> "The 2d section of 2 and 3, Phil. and Mary C. 10, says that the justices shall 'take the examination of such prisoners and information of those that bring him of the facts and circumstances thereof; and the same, or as much thereof as may be material to prove the felony, shall put in writing within two days after the said examination.' The only thing that was by that act to be put in writing was that which was material to prove the felony. The 7 Geo. 4, C, 64, S. 2 was in almost the same language. By this act, what the magistrates were to take down in writing was the information on oath 'of those who shall know the facts and circumstances of the case or so much thereof as may be material,' and it does not seem to contemplate evidence for the defense. Then, again, in Jervis's Act, 11 and 12, Vic. C., 42, S. 17, it is ment on oath or affirmation of those who shall provided that the magistrate shall 'take the statement on oath or affirmation of those who shall know of the facts and circumstances of the case and shall

put the same into writing. Up to this period, then, it is clear that all that was to be put into writing was the evidence that was material to the charge against the accused, and so matters long continued. Then came Russell Gurney's Act 30 and 31, Vic. C. 35. *By the 3d section of that Act, provision is for the first time made for taking the evidence of the prisoner's witnesses.*"

The Queen vs. *Carden*, L. R., 5 Q. B. D., 1, 10. (Italics ours.)

"*Generally speaking the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge.* The defendant's witnesses are never sent to the grand jury, except when the attorney for the prosecution consents thereto. But in this incipient state of the prosecution, the judge *may* examine witnesses who were present at the time when the offense is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution is certainly improper." (Italics ours.)

U. S. vs. *White*, Fed. Cases, No. 16,685.

This case was decided in the U. S. C. C., (District of Pennsylvania,) in 1807, the statutes of Phil. and Mary being at that time in force in that state.

"At common law witnesses for the accused are not necessarily examined at the preliminary hearing."

Clark Crim. Proc., p. 77.

Wharton Crim. Proc. (1918) Vol. I., Sec. 112, says that under the statute it was not the English practice at pre-

liminary examination to hear any witnesses tendered by the defense, supporting this view by a quotation from Blackstone.

Stephen in his History of the Criminal Law of England, Vol. I, p. 221, shows how preliminary examinations were conducted under the statutes of Philip and Mary (still in force in Louisiana) and compares "Jervis' Act" (1848, 11 and 12 Vic. C., 42) with those statutes. So far from having a right to examine witnesses in his behalf, "the prisoner had no right to be, and probably never was present."

In *re Bates*, Fed Cases, No. 1099, a. (U. S. Dist. Ct., S. C., 1858) minutely defines the method of conducting preliminary examinations under the statutes of Phil. and Mary.

> "It is objected that these parties have never been brought before the commissioner, nor examined, nor have the witnesses against them been examined in their presence, nor they allowed the cross-examination of the witnesses. That their commitment in the absence of these prerequisites and without the benefit of counsel, involves a denial of their constitutional and legal rights, and affects the whole proceedings subsequent to the arrest with such gross irregularity that the commitment must be set aside." The Court then goes on to say that preliminary examinations by the magistrates of the United States are according to the laws of the State in which the examination is held, and that South Carolina had continued in force the statutes of Phil. and Mary above quoted. "These statutes may have secured the production before commitment of all the evidence which could be produced against the accused, but, in my judg-

ment, that privilege was secured to him at the expense of others far more important. Be that, however, as it may, these statutes, until 1859, furnished a rule for criminal proceedings in South Carolina." The Court holds that under the statutes of Phil. and Mary the accused had no right to cross-examine the witnesses: "That these constitutional rights [namely, right of assistance of counsel and to be confronted with witnesses] which are supposed to be invaded by this construction are rights which are not contemplated by the constitution in connection with preliminary examination proceedings; the privilege of confronting the witnesses is a privilege which pertains to the trial in court; that it does not extend to all periods in the proceedings is manifest in the fact that it cannot be claimed before the grand jury; a period where, if allowed, it would be far more available for the accused than in the preliminary proceedings before the magistrates. And that the right to have the assistance of counsel is not invaded, since if the statutes of Phil. and Mary were in force it is beyond dispute, in proceedings under them the accused was not entitled to the benefit of counsel as a matter of right."

And the Court quotes as applicable what was said by Chief Justice Marshall, in *Ex parte Bollman,* 4 Cranch, 129:

> "Before the accused is put upon his trial all the proceedings are *ex parte.*"

The later case of *State, ex rel. Johnson and Britton,* 48 La. Ann., 1405, expresses a view directly the reverse of that announced in the *Stewart* case. And no Louisiana decision has affirmed the language or doctrine of the

Stewart case. An affidavit had been made against Johnson and Britton, charging them with murder, and *habeas corpus* had been applied for to the Supreme Court. The Court said that the application was confessedly for a preliminary examination, and that the Justices of the Supreme Court were not committing magistrates. The Court then goes on to say:

> "In contemplation of law, a preliminary examination of an accused person is to be set on foot upon the application of some judge or justice of the vicinage, and its province is to perpetuate the testimony *against* the accused. Revised Statutes, Sec. 1010." (Italics by the Court).

It is to be noted that defendant at no time offered to make a "voluntary statement," what he did was to tender his side of the case at length as a witness in his own behalf.

VI.

THERE WAS NO ERROR IN REFUSING TO HEAR THE TESTIMONY OF MR. W. H. SMITH, TENDERED ON BEHALF OF THE ACCUSED (pp. 64, 98).

Counsel (pp. 61, 66) stated what he proposed to prove by Smith, and the documents, and it will be seen that the testimony and evidence tendered would not have been admissible, even had the hearing been on the trial. The purpose of the offers being, not to show what representations accused made when he induced the jewelers to part with their wares, or as to the truth of the representa-

tions, but to show that he expected to make some money out of some sort of an oil speculation, and that, if he had made the money, he could have paid the Indian jewelers.

VII.

THE DEPOSITIONS FROM LONDON AND GLASGOW ON BEHALF OF EXTRADITION, WHICH THE JUDGE EXCLUDED (p. 59) SHOULD HAVE BEEN RECEIVED.

§5271 R. S. originally provided that copies of depositions upon which an original warrant in any foreign country may have been granted attested and certified as required, could be received in evidence as to the criminality of the person apprehended.

This section was amended by the Act of June 9, 1876, C. 133, 19 Stat., 59, omitting the requirement of the attestation of the copies of the depositions by the oath of the party producing them and eliminating the provision that the depositions were limited to those upon which an original warrant of arrest was granted and allowed original depositions as well as copies to be received in evidence if authenticated and certified to by the principal diplomatic or consular officer of the United States.

The Act of June 19, 1876, was repealed by Section 6 of the Act of August 3, 1882, together with so much of Section 5271 which was inconsistent with the Act of 1882. Section 5 of the Act of August 3, 1882, 22 Stat. 216, is the present law as to the evidence on hearing any extradition case and reads "in all cases where any depositions, warrants or other papers or copies thereof shall be offered

in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants and other papers or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be proper and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

It will be observed that there is no limitation as to the period in which the depositions should be taken and provides for any depositions, etc.; these depositions were certified to by a principal diplomatic officer of the United States, the Secretary of the Embassy (Rev. Stat., §1674) at London, and his certificate recites that they are properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of India as required by the Act of Congress of August 3, 1882. This certificate entitled them to be received and admitted as evidence. The suggestion may be made that no harm has been done in these particular proceedings by the rejection of these depositions as the accused has been held for extradition but these depositions contained very material evidence as to the falsity of the representations made by the accused as to his partnership in Collins Sons & Co., his financial condition and the lack of authority to draw upon the drawee named in the drafts and

removed the criticism on the letters and reports contained in the papers from India.

VIII.

IF THERE WAS SUFFICIENT GROUND FOR HOLDING THE ACCUSED BY THE EXTRADITION JUDGE UPON THE EVIDENCE BEFORE HIM, HE IS NOT TO BE DISCHARGED FOR DEFECTS IN THE ORIGINAL ARREST OR COMMITMENT.

Yordi vs. *Nolte*, 215 U. S. R., 227;
Nishimura Ekin vs. *U. S.*, 142 U. S., 651, 652.

IX.

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED SO FAR AS THE DENIAL OF HABEAS CORPUS IN THE RAZA CASE NO. 977, AND SHOULD BE REVERSED IN SO FAR AS IT REMANDS THE ACCUSED TO THE EXTRADITION JUDGE FOR FURTHER HEARINGS IN THE POHOOMULL BROTHERS AND GANESHI LALL & SONS CASES, NO. 978 AND THAT HABEAS CORPUS BE REFUSED IN THE PROCEEDINGS IN THOSE CASES, ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ROBERT H. MARR,
CHARLES FOX,
Of Counsel for Appellee,
in No. 977 and for appellant in No. 978.

Supreme Court of the United States.

October Term 1918.

No. 977.

CHARLES GLEN COLLINS, APPELLANT,

vs.

FRANK M. MILLER, U. S.
Marshal for the Eastern District of Louisiana.

No. 978.

TOM. F. CARLISLE, BRITISH CONSUL GENERAL, APPELLANT,

vs.

CHARLES GLEN COLLINS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

STATEMENT.

The appellant in No. 977 was committed for extradition, upon three separate charges of obtaining property by false pretences in India.

The proceedings were held before and heard by Hon. Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana, at New Orleans. He deemed the evidence sufficient to sustain the charges and committed the accused to

abide the order of the President of the United States in the premises (pp. 100-101) and certified the proceedings to the Secretary of State (p. 104).

The complainants in India were respectively Pohoomull Brothers, Ganeshi Lall & Sons and Mohamed Alli Zaimel Ali Raza.

The extradition treaty with Great Britain of 1900-1901 (32 Stat. 1864) provides for extradition for the crime of "obtaining money, valuable securities or other property by false pretences".

The appeal in No. 977 is from the judgment (p. 105) of the District Court for the Eastern District of Louisiana, denying the application of the appellant for a writ of habeas corpus to review his commitment on the charge in the Mohamed Alli Zaimel Ali Raza case.

The appeal in No. 978 is from the same judgment of the same District Court, granting a writs of habeas corpus to Collins on his commitment on the charges in the Pohoomull Brothers and Ganeshi Lall & Sons cases, but remanding him to the House of Detention in New Orleans and sending the proceedings back to Judge Foster to the end that the accused be given the opportunity of introducing such evidence as he might offer at a preliminary examination under the law of Louisiana, the accused not having been given the opportunity in the first instance to testify in his own behalf (p. 61). The error assigned in No. 978, is the granting the writs of *habeas corpus* and remanding the proceedings to Judge Foster that the accused be given an opportunity to introduce such evidence as he might offer at a preliminary examination under the laws of Louisiana (p. 116).

ment, that privilege was secured to him at the expense of others far more important. Be that, however, as it may, these statutes, until 1859, furnished a rule for criminal proceedings in South Carolina." The Court holds that under the statutes of Phil. and Mary the accused had no right to cross-examine the witnesses: "That these constitutional rights [namely, right of assistance of counsel and to be confronted with witnesses] which are supposed to be invaded by this construction are rights which are not contemplated by the constitution in connection with preliminary examination proceedings; the privilege of confronting the witnesses is a privilege which pertains to the trial in court; that it does not extend to all periods in the proceedings is manifest in the fact that it cannot be claimed before the grand jury; a period where, if allowed, it would be far more available for the accused than in the preliminary proceedings before the magistrates. And that the right to have the assistance of counsel is not invaded, since if the statutes of Phil. and Mary were in force it is beyond dispute, in proceedings under them the accused was not entitled to the benefit of counsel as a matter of right."

And the Court quotes as applicable what was said by Chief Justice Marshall, in *Ex parte Bollman,* 4 Cranch, 129:

> "Before the accused is put upon his trial all the proceedings are *ex parte.*"

The later case of *State, ex rel. Johnson and Britton,* 48 La. Ann., 1405, expresses a view directly the reverse of that announced in the *Stewart* case. And no Louisiana decision has affirmed the language or doctrine of the

Stewart case. An affidavit had been made against Johnson and Britton, charging them with murder, and *habeas corpus* had been applied for to the Supreme Court. The Court said that the application was confessedly for a preliminary examination, and that the Justices of the Supreme Court were not committing magistrates. The Court then goes on to say:

> "In contemplation of law, a preliminary examination of an accused person is to be set on foot upon the application of some judge or justice of the vicinage, and its province is to perpetuate the testimony *against* the accused. Revised Statutes, Sec. 1010." (Italics by the Court).

It is to be noted that defendant at no time offered to make a "voluntary statement," what he did was to tender his side of the case at length as a witness in his own behalf.

VI.

THERE WAS NO ERROR IN REFUSING TO HEAR THE TESTIMONY OF MR. W. H. SMITH, TENDERED ON BEHALF OF THE ACCUSED (pp. 64, 98).

Counsel (pp. 61, 66) stated what he proposed to prove by Smith, and the documents, and it will be seen that the testimony and evidence tendered would not have been admissible, even had the hearing been on the trial. The purpose of the offers being, not to show what representations accused made when he induced the jewelers to part with their wares, or as to the truth of the representa-